Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 889.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office,

Appellants,

vs.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JAMES W. VROOM, and JOHN WATTS,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief on Behalf of the Appellees.

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BRIEF ON BEHALF OF APPELLEES.

Statement of the Case.

This is an appeal (Transcript of Record, pp. 353-355) from a decree of the Court of Appeals of the District of Columbia (Rec., p. 362), affirming a decree of the Supreme Court of the

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* Original docket with Cornelius C. Watts, *et al.* v. Richard A. Ballinger, Secretary of the Interior, and Frederick Dennett, Commissioner of the General Land Office, subsequently changed to Same v. Walter L. Fisher, Secretary, &c., and subsequently changed to Same v. Franklin K. Lane, Secretary, &c., and Clay Tallman, Commissioner, &c.

District of Columbia (Rec., pp. 309, 310), signed by Mr. Justice BARNARD, and filed on June 3, 1913, enjoining the defendants, who are respectively Secretary of the Interior and Commissioner of the General Land Office, from proceeding in the matter of certain attempted entries under the Public Land Laws upon lands granted to the heirs of Luis Maria Cabeza de Baca by Act of Congress on June 21, 1860, and the title to which was found to have passed out of the United States April 9, 1864, and requiring said defendants to forthwith place on file as the plaintiffs' muniment of title and for future reference a certain plat of said lands for the purpose of defining the outbounderies of said lands and segregating them from the public domain.

The suit is for an injunction enjoining the defendants, who are, respectively, Secretary of the Interior and Commissioner of the General Land Office, from proceeding in the matter of an alleged homestead entry, or in any other matter affecting certain land in Arizona granted to the heirs of Luis Maria Cabeza de Baca by the Sixth Section of the Act of Congress approved June 21, 1860 (12 Stat., 71), the title to which passed out of the United States at least as early as April 9, 1864, and the title to which has become vested in the plaintiffs by *mesne* conveyances, and to require the placing on file of a certain survey of such land necessary to segregate the plaintiffs' land from the public domain.

Bill of Complaint.

The bill (Rec., pp. 1–16), is framed in two aspects and for two purposes:

> "(1) To enjoin the appellants who are respectively Secretary of the Interior and Commissioner of the General Land Office, from proceeding in the matter of certain alleged entries upon the land in question, on the ground that title to said lands passed out of the United States and vested in the predecessors in title of the

plaintiff, April 9, 1864, and the jurisdiction of the land department over said land then ceased. This is upon the well established principle that where the act of the head of a department under any view of the facts before him is *ultra vires* and beyond the scope of his authority —that if he has no power at all to perform the acts complained of, he is subject to an injunction (*Noble v. Union River Logging R. R. Co.*, 147 U. S., 165, 171, 172, and cases there cited).

(2) To enjoin the appellants who are respectively Secretary of the Interior and Commissoner of the General Land Office, to place on file the approved plat and field notes of the Contzen survey for future reference according to law in order to define the outboundaries of the land and to segregate the same from the public domain, and as a muniment of plaintiffs' title. This is upon the well established principle that a mandatory injunction is the counterpart in equity of a mandamus at law and may be used against public officers (*Parsons v. Marye*, 23 F., 113, 121; *Bailey v. Schnitzius*, 45 N. J. Eq., 178; *People v. McKane*, 78 Hun 154; *Proctor v. Stuart*, 4 Okla., 679), where the act required to be done is ministerial (*Ballinger v. U. S. ex rel. Frost*, 216 U. S., 240, 249-50; *Roberts v. United States*, 176 U. S., 221, 229; *Barney v. Dolph*, 97 U. S., 652, 656; *Simmons v. Wagner*, 101 U. S., 260, 261; *Stark v. Starrs*, 6 Wall., 402; *United States v. Schurz*, 102 U. S., 378, 403).

In other words the suit is brought against certain executive officers of the Government to enjoin them from doing an act which the law gives them no authority to do.

The mandatory injunction prayed for in the second prayer of the bill requires the defendants to perform a purely ministerial act, according to the contention of the plaintiff and according to the theory upon which the bill is framed.

Whether the third prayer of the bill goes further than it should is immaterial since there is a prayer for general relief; and a mandatory injunction requiring the defendants to place on file the survey merely as showing the outboundaries of the

land is certainly within the jurisdiction of the Court and would limit the survey, so far as the plaintiffs are concerned, to a survey of the outboundaries of the land.

The question whether the act is ministerial or not has no application to the first prayer of the bill, which is clearly within the principle that an injunction is proper where the defendants propose to do an act which is *ultra vires* and entirely beyond the scope of their authority as officers of the Government.

Demurrer.

The appellants demurred (Rec., pp. 17–9) to the bill upon various grounds, among others, that the Unted States was a necessary party and that the suit was to try title to land in Arizona.

Decision on Demurrer.

After an elaborate argument a decision (Rec., pp. 19–28) was made overruling the demurrer, on the grounds, among others, that the United States was not a necessary party and that title to the land in question passed out of the United States on April 9, 1864.

Answer.

The appellants thereafter answered (Rec., pp. 31–142) admitting the facts alleged in the bill, renewing the objections that the Court had no jurisdiction because the action was to try title and because the United States was a necessary party; and alleging facts which these defendants claimed showed that the land department had not lost jurisdiction of the land.

Evidence.

The appellees offered evidence (Rec., pp. 316–337) to show their title and right to maintain this suit, which will be particularly commented on later, and the appellants offered evidence (Rec., pp. 145–301) in support of the allgeations of the answer.

Decision of the Trial Court.

The decision of the trial court (Rec., pp. 309, 310) found that the title to the land in question passed out of the United States, and vested in the heirs of Luis Maria Cabeza de Baca April 9, 1864; that thereafter the land department of the United States ceased to have any jurisdiction over said land except for the purpose of surveying the outboundaries thereof in order to segregate the same from the public domain; that the plaintiffs had shown sufficient title in themselves to maintain the suit; and then enjoined the defendants to place on file as muniment of title and for future reference the survey of the land for the purpose of defining its outboundaries and segregating the same from the public domain; and enjoined the defendants from proceeding with the Ohm entry or any other entries on said land or otherwise interfering therewith except to file the survey.

In its opinion the trial court after reciting the facts (Rec., pp. 304, 309) held that this was not a suit to try title; that the United States was not a necessary party; that adverse claimants to the land would not be affected by the decision and their rights, if any, could be determined in another court; that the proceedings had in the land department between 1866 and 1899 in reference to changing the location of the land were had under a mutual mistake of claimants and the department and as between the United States and the successors in title of the heirs of Baca could not affect the right of such successors to the land here in question; that the alleged interfering private land claims would not defeat the selection by the heirs of Baca if such selection was approved prior to the disclosure of such claims by due presentation to the Surveyor General; that the land department had no authority to require claimants to pay the cost of survey; that the appellants are in error in maintaining that the land is still within the jurisdiction of the department; and the opinion concludes "I must hold that the title passed on April 9, 1864, to

the heirs of Baca; and if I might (am right) in that conclusion, then, under the authority of the Supreme Court, in *Noble v. Union River Logging Railroad Co.*, 147 U. S., 165, and other authorities cited, I think this court has authority to enjoin the defendants from treating the said tract of land as being any longer public land." (Parenthesis ours).

Decision of the Court of Appeals.

The Court of Appeals (Rec., p. 352) affirmed the decree of the trial court in its entirety.

In its opinion the Court of Appeals after an excellent statement of the facts, commencing with the words "By the treaties of Guadalupe Hidalgo and Mesilla" (Rec., p. 341) and concluding with the words "until final decision upon this Baca Float" (Rec., p. 346), which for the purpose of this brief is a sufficient statement of the facts says (Rec., p. 350):

> "We think the conclusion irresistible, from the language of this certificate '(referring to the Commissioner's order of Apr. 9, 1864)' that the Commissioner, having carefully considered all the facts in the case, concluded to adopt the approval of the surveyor general of New Mexico of this location to perfect title under the authority of said act, and in order to completely segregate this land from the public domain ordered the survey.
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> * * * * * * *
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> "But when the Land Office, upon whom devolved the duty of passing upon the location of this land, had acted, we think the title became absolutely confirmed in the heirs of Baca and that the survey which the Land Office directed to be made was essential only 'for the purpose of definitely segregating the land, to which the right was confirmed, from the public domain, and thus finally fixing the extent of the rights of the owners of the grant.' *Stoneroad vs. Stoneroad*, 158 U. S., 240. And when the title to this land passed out of the United States and vested in these heirs, the finding as to the

> character of the land could not thereafter be disturbed by the Land Office."

The opinion then states (Rec., pp. 351, 352) that the proceedings between 1866 and 1899 do not affect the question here; that the alleged interfering private land claims being undisclosed April 9, 1864, could not deprive the land department of jurisdiction over the land in question; that any adverse claims must be adjudicated elsewhere; that claimants were not required to pay the costs of survey; and that plaintiffs had established a *prima facie* title.

For the convenience of the court analyses of the bill of complaint, demurrer, decision on the demurrer and answer, are attached as appendices A, B, C, and D.

This case involves one of five Floats known as Baca Floats Nos. 1, 2, 3, 4 and 5, being the third thereof, the location of the fourth of which under almost identical circumstances was sustained by the United States Supreme Court in *Shaw v. Kellogg*, 170 U. S. 312, and Mr. Justice BARNARD in his opinion (Rec., p. 308), recognized that case as controlling in this, saying:

> "The title to the tract selected, under the authority of the Supreme Court, in the case of Shaw v. Kellogg, 170 U. S., 312, passed to the heirs of Baca when that approval was made, on April 9, 1864.
>
> "While the two cases differ in some respects, the substantial facts necessary for the title to pass seem to be present in this case, as in the case of Shaw v. Kellogg. The fact that mineral might be discovered in the land thereafter could not defeat the selection when once approved."

And the Court of Appeals relied on that case as containing much that was helpful to the determination of this case (Rec., p. 347).

Assignment of Errors.

The appellants assign thirty errors, but they fall into the following groups:

1. The first six allege error in assuming jurisdiction to try title to land in another jurisdiction claimed by the United States without the latter being made a party.

2. The next ten relate to alleged errors in assuming jurisdiction over matters exclusively within the jurisdiction of the land department requiring the exercise of judgment and discretion on the part of its officials, including the question whether or not the title to the land had passed out of the United States, whether or not the acceptance and filing of approved plat and field notes of survey whereby the surveyor general makes location as vacant and nonmineral the land selected was necessary, whether or not said land is still a part of the public domain, whether the action of the commissioner on April 9, 1864, passed title out of the United States, whether or not the Sonoita and Calabazas and Tumacacori claims were "preserved" from selection by the Baca heirs, and whether or not the area embraced in Tubac Township was occupied and not vacant and therefore reserved from selection by the Baca heirs.

3. The next two assign error because the court held that the title passed April 9, 1864, prior to survey and placing on file of approved plat and field notes thereof.

4. The next two assign error because as claimed the court held that the commissioner had authority, in the absence of a determination of the character of the land by the proper surveyor general, to determine the character of the land, approve the selection and pass title from the United States; and did not hold that the surveyor general in the first instance should determine the character of the land.

5. The next two assign error because the court held that the Surveyor General of New Mexico was the proper officer

to act upon the selection and not the Surveyor General of Arizona.

6. Error is then assigned because the court held that the commissioner by his letter directing a survey dated April 9, 1864, determined the character of the land, approved the location and passed the title; that the deed of May 1, 1864 (Plff.'s Exh. A. H., No. 1) proved itself and that plaintiffs had shown title in themselves sufficient to maintain the action; that the Tumacacori, Calabaza and Sonoita grants did not so far as they conflicted with the selection defeat such selection; that affirmative action on the part of those claiming under alleged Spanish or Mexican grants was required in order to reserve the lands covered thereby from other appropriation as public lands; that the defendants were enjoined from further proceeding with the alleged entries upon said land; that the defendants be enjoined to place on file the plat and field notes of the Contzen survey; and that the action of the trial court be affirmed.

Motion to Dismiss.

This case was not appealable to this Court from the Court of Appeals of the District of Columbia.

The Judicial Code, Act of March 3, 1911 (U. S. Compiled Statutes, Supp. 1911, page 231), provides as follows:

> "SECTION 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be re-examined and affirmed, reversed or modified by the Supreme Court of the United States upon Writ of Error or appeal in the following cases:
>
> "FIRST. In cases in which the jurisdiction of the trial court is in issue; but where any such case is not otherwise reviewable in said Supreme Court then the question of jurisdiction alone shall be certified to the said Supreme Court of the United States.
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> * * * * * *
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> "FIFTH. In cases in which the validity of any

authority exercised under the United States or the existence or scope of any power or duty of an officer of the United States is drawn in question.

"SIXTH. In cases in which the construction of any law of the United States is drawn in question by the defendant."

The Notice of Appeal (Rec., p. 353) claims the right of appeal:

"(*a*) Under paragraph 6 of the above on the ground that the construction of the Act of June 21, 1860, was drawn in question by the defendants by the contention of the defendants that the title did not pass out of the United States under said act until the acceptance by the Department of the Interior and the filing therein of an approved plat and field notes of a survey whereby a surveyor general reported the land vacant and non-mineral at the date of selection.

(*b*) Under paragraph 5 of said section of said Code on the ground that the validity of the authority as well as the existence and scope of the power and duty of the defendants both officers of the United States was drawn in question;

(*c*) Under paragraph 1 of said section of said Code on the ground that the jurisdiction of the trial court to proceed in said cause in the absence of the United States as a necessary party or to review and interfere with or to control the acts of the Secretary in respect to a case pending before him through injunction was in issue."

In their demurrer (Rec., pp. 17, 18) the appellants attempted to raise an issue as to the jurisdiction of the trial court on the following grounds: (*a*) that the suit involved the trial of title to land not within the jurisdiction of the court; (*b*) that the United States was a necessary party to the suit and had not consented to be sued; and (*c*) because the acts complained of were exclusively within the jurisdiction of the

Interior Department and required the exercise of judgment and discretion on the part of the defendants as officers of that department and were not subject to control, interference or review by the judiciary department in injunction proceedings.

In their answer (Rec., pp. 83, 84) the appellants renewed the objections raised to the proceeding by their demurrer.

And in their assignment of errors (Rec., pp. 355–359) the appellants have attempted to reserve their rights under the objections made by the demurrer and answer to the jurisdiction of the trial court.

We are fortunate in having recent decisions of this court construing the provision of the Judicial Code as to appeals to this Court from the Court of Appeals of the District of Columbia.

In *Champion Lumber Co. v. Fisher*, 228 U. S., 445, where it was sought to mandamus the Secretary of the Interior to issue a patent in a case in which he had held that certain reports of a special agent amounted to the filing of a protest within two years under the provision of the act involved, the court said (p. 450):

> "'Drawn in question' is a phrase long used in other statutes of the United States regulating appellate jurisdiction. It is found in section 709 of the Revised Statutes. * * * It is found in the 5th section of the Circuit Court of Appeals Acts. * * * It is found in the statute regulating Territorial Appeals. * * *
>
> "In *Muse v. Arlington Metal Co.*, 168 U. S., 430, * * * Mr. Chief Justice FULLER * * * reviewed the cases in this Court and stated as the conclusion of the matter that in order to involve the validity or construction of a treaty 'some right, title, privilege or immunity dependent on the treaty must be so set up or claimed as to require the Circuit Court to pass on the question of validity or the construction in disposing of the right asserted'. In *Pettit v. Walshe*, 194 U. S., 205, 216, the construction of a treaty was

held to be drawn in question where the petition for a writ of *Habeas Corpus* and the warrant on which the accused was arrested referred to the treaty and the court below proceeded on the ground that the determination of the questions involved in the case depended upon the meaning of certain provisions of that treaty, these provisions having been duly brought to the attention of the court. * * *

(451) * * * The petitioner did not challenge nor did the court pass upon the validity of any authority exercised under the United States nor was the existence or extent of the authority or duty of an officer of the United States drawn in question in the sense in which it is used in the statute, that is, brought forward and made a ground of decision."

In *Foreman v. Meyer*, 227 U. S., 452, in which the plaintiff sought to be placed on the retired list of the navy as a paymaster's clerk, the court said (p. 455) :

"The case was made and the decision was had in the Court of Appeals upon the issue whether under the statutes invoked by the petitioner as the ground of his right to the relief sought he was or was not a paymaster's clerk entitled to be entered upon the register of retired officers of the navy.

"The validity and scope of the authority of an officer of the United States is not drawn in question where the controversy is confined to the determination whether the facts under which he can exercise that authority do or do not exist."

In the case at bar there was no issue properly raised as to the jurisdiction of the trial court and consequently no right of appeal under the first paragraph of the section of the Judicial Code quoted for two reasons :

1. The suit was not one to try title to land, the question of the title being a jurisdictional fact necessary

to determine before the court could pass to the question actually involved in the relief sought, that is, whether the defendants in what they proposed to do were acting without authority of law (*Noble v. Union River Logging Co.*, 147 U. S., 165, 171, 172 and cases cited; *Philadelphia Co. v. Stimson*, 223 U. S., 605, 622).

2. The United States was not a necessary party under either phase of the case (*a*) because the suit sought an injunction against the defendants because they proposed to interfere without authority with the right of the plaintiff (*United States v. Lee*, 106 U. S., 196; *Cunningham v. Macon & B. R. R. Co.*, 109 U. S., 446; 454–457), and (*b*) because the suit seeks a mandatory injunction requiring the defendants to perform the purely ministerial act of placing on file the Contzen Survey (*Parsons v. Marye*, 23 F., 113, 117).

3. The question whether the defendants' acts were upon matters within the exclusive jurisdiction of the Interior Department or involved the exercise of judgment and discretion by them goes rather to the merits of the case * * * than to the question of jurisdiction since the relief demanded—a restraining injunction and a mandatory injunction—may be granted only in case the plaintiffs' contention that the title to the land passed out of the United States on April 9, 1864, and the jurisdiction of the Land Department over said land then ceased is found as a jurisdictional fact to be correct.

It is not thought to be necessary to further elaborate the question as to whether or not the issue of jurisdiction of the trial court was properly raised, because the appellees earnestly contend that the raising of such an issue was foreclosed by a long line of cases in this court including *United States v. Lee*, *supra*, *The Virginia Coupon cases*, *Belknap v. Schild*, 161 U. S., 10, and others, in which, provided the facts constituting the basis of suits for injunctions against individuals purporting to act as officers of a State or of the United States are

shown, it is held that trial courts as courts of equity have jurisdiction (without the State or the United States being a party) to pass upon the case.

No appeal is justified in the case at bar on the ground that the construction of the Act of June 21, 1860, is drawn in question by the defendants or that the validity of the authority or the existence or scope of the power and duty of the defendants is drawn in question.

The construction of the Act of June 21, 1860, was not "drawn in question" by the defendants in the court below. The words "drawn in question" have been frequently considered by the Supreme Court of the United States, and the meaning imputed to them is declared in several cases, and particularly in the recent case of the *Champion Lumber Company v. Fisher, supra*, is that as used in the statute, they mean "brought forward and made a ground of decision." It will become apparent upon an examination of the appellants' answer that they did not bring the construction of the Act of June 21, 1860, forward and make it a ground of decision; but on the contrary, the construction of that statute was brought forward by the appellees in the court below, and the relief they prayed for was predicated upon the ground that it, supplemented by the intervening steps and by the order of the Commissioner of the General Land Office made April 9th, 1864, passed the title to Baca Float No. 3 out of the United States and into the heirs of Baca.

Nowhere in the appellants' answer do they invoke a construction of that statute. But even if they had done so, they could not be said to have "brought it forward and made it a ground of decision," because the appellees had already done that. It is very true that the appellants attempted in their assignment of errors to challenge the construction of that statute; but that does not meet the requirement of the statute regulating appeals from the Court of Appeals to the Supreme

Court of the United States, for the latter has expressly said that :

> " An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below, and the rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the Act of March 3rd, 1891 " (*Ansbro v. U. S.*, 159 U. S., 698).

In the case at bar, just as in *Champion Lumber Company v. Fisher, supra*, there was no controversy as to the construction or validity of the act of June 21, 1860. Both parties admitted and relied upon the act. The difference between the parties just as in the Champion Lumber Company case was whether what was done passed the title or not. In other words, the question in controversy is whether the Commissioner of the General Land Office in his order for the survey of the land, dated April 9, 1864, in legal effect approved the selection which had been made and in so doing determined that the character of the land was such as the heirs of Baca were authorized to select.

This is very similar to the determination whether or not a certain action amounts to a protest within the act considered in the Champion case.

Here as there, the commissioner of the General Land Office was the person to decide whether the heirs of Baca had conformed to the law in making the selection they did and his action cannot be questioned either by the courts (*Champion v. Fisher, supra*), nor by his successors in office (*Noble v. Union Logging R. R. Co., supra ; United States v. Stone*, 2 Wall., 525, 535 ; *Moore v. Robbins*, 96 U. S., 530).

Neither was the validity of any authority exercised under the United States or the existence or scope of any power or duty of an officer of the United States drawn in question. Both sides were entirely agreed upon the existence, scope of

authority and validity of the exercise of such authority by the Secretary of the Interior and of the Commissioner of the General Land Office upon a state of facts which called for the exercise of such authority. The difference between the parties was as to the legal effect of the facts in this case in taking the case out of the jurisdiction of the land department (*Foreman v. Meyer, supra*).

For the foregoing reasons, and under the foregoing authorities, it is contended on behalf of the appellees, that this appeal should be dismissed because not within the terms of section 250 of the Judicial Code.

Brief of the Argument.

Prior to the session of the territory which now constitutes New Mexico and Arizona, grants had been made to one Luis Maria Cabeza de Baca of certain lands to which the town of Las Vegas also made claim. Under the act of Congress of July 22, 1854 (*10 Stat., 308*), and the regulations issued in connection therewith by the Secretary of the Interior (*Public Domain, 394–398*), the Surveyor General on December 18, 1858, reported (Rec., p. 4) that without the other, either of said grants would be a valid claim and therefore referred the matter to Congress. The Senate Committee on private land claims on May 19, 1860 (Rec., p. 4), recommended that in view of the willingness of the heirs of Luis Maria Cabeza de Baca to waive their right in favor of the junior grant to the town of Las Vegas such heirs be permitted to enter an equivalent quantity of land elsewhere in the territory of New Mexico. Thereupon, Congress by the act of June 21, 1860, section 3, confirmed both claims and by section 6, further enacted

> "That it shall be lawful for the heirs of Luis Maria Baca who make claim to the same tract of land as is claimed by the town of Las Vegas to select instead of the land claimed by them an equal quantity of vacant land

not mineral in the territory of New Mexico to be located by them in square bodies not exceeding five in number; and it shall be the duty of the Surveyor General to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them, provided, however, that the right hereby granted shall continue in force for three years from the passage of this act and no longer."

Within the three years and on June 17, 1863 (Rec., p. 6), John S. Watts, as attorney for the heirs of Baca, made application to the Surveyor General of New Mexico to select and locate as one of the five locations the land in question here, concluding such application with the statement " said tract of land is entirely vacant, unclaimed by anyone, and is not mineral to my knowledge." On the same day the Surveyor General certified to the making of said application (Rec., p. 7), closing his certificate with the words " said location is hereby approved " and on the following day, forwarded the said certificate and application to the Commissioner of the General Land Office at Washington.

Thereafter, and on April 9, 1864 (Rec., pp. 9, 10), the Commissioner of the General Land Office gave directions for the survey and marking of the boundaries of said land specifically directing how the monuments should be placed and marked, directing attention to the fact " that the location of the one-fifth part of said grant as set forth by the claimants has been approved by the Surveyor General of New Mexico under whose jurisdiction the application came at the date of the approval." And adding (Rec., p. 11), " The foregoing statement and the certificate of Surveyor General Clark having been submitted to this department, and having undergone a careful examination, the location being approved by him to perfect title under the authority of the act approved June 21, 1860, application for survey having been made, Instructions (copy herewith attached)

have been given to Surveyor General Levi Bashford, of Arizona, in which territory the lands located now are, to run the lines indicated and forward complete survey and plat to be placed on file for future reference as required by law."

In said directions for survey the Commissioner (Rec., p. 10) instructed the Surveyor General to proceed whenever the claimants should provide for the payment of the expenses of the survey.

Owing to certain proceedings in the land department based on a mutual mistake on the part of the claimant and of the land department, which mistake was not discovered until 1899, and to the fact that the department insisted upon its requirement that the claimants should pay the cost of the survey, no survey was made until 1905, when the survey which it is sought by this suit to require the defendants to place on file was made.

The appellees' contention is that the only conditions imposed by the act of June 21, 1860, were that the land as a whole should be vacant and nonmineral meaning "They (the heirs of Baca) were not at liberty to select lands already occupied by others. * * * Nor were they at liberty to select lands which were then known to contain mineral" (*Shaw v. Kellogg*, 170 U. S., 312, 332) and that the selection should be made within three years; that, the act making no provision as to what official on behalf of the government should determine whether the character of the land was such as the claimants were entitled to select, the commissioner of the General Land Office was under the general laws such official; that that part of New Mexico being at the time *terra incognita* and John S. Watts then one of the leading citizens of that section of the country having stated "said tract of land is entirely vacant, unclaimed by any one and is not mineral to my knowledge," and the surveyor general of the territory having expressly approved the location, etc., the action of the commissioner on April 9, 1864, was the final act on

behalf of the government and title then vested in the heirs of Baca and passed out of the United States.

This contention of the appellees has been sustained by both the trial court and by the court of appeals.

The various objections (except those to the mode of proceeding which are elsewhere considered) may be here answered generally as follows, though they are discussed in detail later in the brief :

As to the objection that the claimants prior to making the selection of June 17, 1863, had exhausted their rights by the selection made on November 18, 1862, at "Bosque Redondo" on the Pecos River in New Mexico (appellants' brief, pp. 11, 26, 39, 49), the selection at Bosque Redondo was withdrawn by the claimants with the consent of the Commissioner of the General Land Office before such selection had become effective by the approval of the Commissioner. It is not the fact that the only difference was that one was within the three years and the other not.

As to the objection that the application should have been made to the surveyor general of Arizona (brief, pp. 36, 45), it is sufficient to point out that the Commissioner in his letter of April 9, 1864, recognized that the surveyor general of New Mexico was the proper person to whom the application should have been made ; that the surveyor general of the new territory of Arizona did not arrive in Arizona to take up the duties of his office until January 25, 1864 (Rec., p. 156) ; that his functions as Surveyor General of Arizona did not commence until then (Act of February 24, 1862, 12 Stat. 665) and that the surveyor general of New Mexico was expressly named in the Act of June 21, 1860.

As to the point that the selection of June 17, 1863, was changed when the application of April 30, 1866, to amend the location was made (brief, pp. 11, 28, 38, 39, 49), it is sufficient to say that it is evident that claimants never intended to change the selection of June 17, 1863, unless they received the land embraced in the alleged amended application ; that all the pro-

ceedings in regard to and subsequent to the 1866 location were due to mutual mistake as was determined in 1899; that prior to 1899 when the department remitted claimants to the selection of June 17, 1863, the department had steadily refused to allow entries upon said land as public lands except in a tentative manner (appellants' brief, p. 80); and that in said decision the secretary recognized the claimants' right as still existing to the 1863 location (Rec., p. 216). Under these circumstances it is submitted that it would be most inequitable to allow the United States on such a ground to deprive the appellees as the successors in title of the heirs of Baca of what the United States gave the latter in exchange for their valid claim to the land now occupied by Las Vegas.

As to the objection that the Tumacacori and other private land claims were reserved and so far as they conflicted with the selection of June 17, 1863, defeated such selection (appellants' brief, pp. 8, 57), it is sufficient to say that at the time of the selection they were undisclosed private claims, not reserved, and could not deprive the land department of its right to appropriate the public lands to the satisfaction of the claim of the heirs of Baca. Moreover, it has been decided by this court that except as to a small portion of one of the claims, Sonoita, (171 U. S., 220), the balance of the claims were and are void and of no effect.

As to the objection that the Surveyor General's report dated November 5, 1906 (Rec., pp. 91, 255), shows that the land selected June 17, 1863, was not vacant and was mineral, it is sufficient to say that that report is not in evidence and that the jurisdiction of the land department over this land ceased April 9, 1864; that the surveyor general had no authority or jurisdiction to make his alleged report in 1906, nor had the commissioner of the General Land Office any authority to instruct him to make such investigation and report; that the same is void and of no effect; and further that the alleged evidence upon which he bases his report is insufficient, immaterial and incompetent.

Statement of Facts.

In view of the statement of facts in the opinion of the Court of Appeals (Rec., pp. 341-346) and that in the opinion of the trial court (Rec., pp. 301-309), which the appellees deem a sufficient statement of facts, the appellees deem it unnecessary under the rule for them to do more than point out that the appellants have stated the facts argumentatively and that an examination of the references to the record in the appellants' brief will show what the actual facts are and the appellees' references to the record in the course of the argument will show wherein the inferences drawn by the appellants are not justified.

It is not fair to say, as is done (appellants' brief, p. 12), that the deeds introduced by appellees show a conveyance of the land as described in the selection of 1866, because that is one of the questions involved, the appellees claiming that in legal effect such deeds conveyed the land described in the selection of 1863.

While it is true, as stated (brief, p. 13), that the appellants attempted to introduce exemplified copies of the records of the Land Department showing the status from 1863 to 1899, the appellees objected to the introduction of such records subsequent to April 9, 1864, on the ground that the Land Department had no jurisdiction to act in the matter, except to make and file the survey, and on other grounds more particularly stated in the objections, and they insisted before the Court below and insist here that such objections should be sustained.

While the Court does say (R , p. 304), "The crux of the present controversy is the question, Was the title devested from the United States and vested in the heirs of Baca or their assigns on April 9, 1864"; that is merely, as said by the Supreme Court (*Noble v. Union River Logging Railroad Co.*, *supra*), a jurisdictional fact necessary to be determined before the Court could proceed to pass upon the main question whether the plaintiffs were entitled to the injunctive relief sought.

POINTS.

I.

The object of this suit is to procure the placing on file of the Contzen Survey for the purpose of defining the outboundaries of the land selected on behalf of the heirs of Baca June 17, 1863, under the Act of June 21, 1860, and of segregating the same from the public domain; and to enjoin the defendants, who are respectively Secretary of the Interior and Commissioner of the General Land Office, from further proceeding to cloud the Appellees' title thereto.

II.

The title to the land in question vested in the predecessors in title of the Appellees, the heirs of Baca, April 9, 1864, and the United States was then divested of title to the land.

III.

The Appellees deraign title from the heirs of Baca.

IV.

No error has been shown in the decree appealed from.

V.

All the equities are with the Appellees.

POINTS.

I.

The object of this suit is to procure the placing on file of the Contzen survey for the purpose of defining the outboundaries of the land selected on behalf of the heirs of Baca June 17, 1863, under the act of June 21, 1860, and of segregating the same from the public domain; and to enjoin the defendants, who are respectively Secretary of the Interior and Commissioner of the General Land Office, from further proceeding to cloud the appellees' title thereto.

The assignment of errors of the appellants and the brief filed on their behalf are based upon a misconception of the character of the suit, the purpose for which it is brought, and the effect of the judgment entered therein.

Tried by the appellants' own criterion, this suit is not to try the title to the land embraced within the selection of June 17, 1863.

The appellants say (brief, p. 22), "The test is the effect of the judgment or decree which can be entered," citing *Oregon v. Hitchcock*, 202 U. S., 60.

In this case the judgment entered does not purport to decide as against the United States the question of title, or as against the holders of the rights under the Sonoita, Tumacacori and Calabasas grants as to whether or not the areas covered by said grants were reserved June 17, 1863, and therefore in contemplation of law, not vacant and subject to selection by the heirs of Baca; nor does it attempt to decide any rights as to the inhabitants of the township of Tubac, nor even as to the rights of the various entrymen. It merely finds

that the land was not public land, and consequently the defendants had no jurisdiction over it.

As stated in Judge BARNARD'S opinion (Rec., p. 305) :

> " There may be a serious question to be tried out in some other court as to whether the San Jose de Sonoita grant, or that portion of it which was held to be valid by the Supreme Court, will have a prior right to the Baca heirs ; * * *
>
> " Suit cannot be maintained in this court for the purpose of trying the title to said tract of ground as between adverse claimants. That must be tried in the local courts ; and if the facts disclosed by the record now are sufficient to show that the title passed from the United States, then it is clear that the United States is not a necessary party defendant herein.
>
> " It is also clear that any claimants who have settled on portions of the said tract, pending negotiations between the Baca heirs and the government, and who are not parties herein, or any claimants under Mexican grants that conflict with the claim of the Baca heirs, or the town of Tubac, if on this tract, not being parties herein, will not be bound by any judgment that this court may enter. If adverse claims are made to any portion of the said tract, they must be adjudicated in the courts of Arizona, if title passed from the United States, as contended by plaintiffs."

The finding of the Court that the decision of the Commissioner of the General Land Office of April 9, 1864, the ordering of the survey, etc., devested the United States of title is merely a preliminary finding which was necessary to be made before the Court could take jurisdiction to pass upon the prayers of the bill for the injunctions against the defendants.

The principles involved are fully supported and very clearly stated in the following case, which is quoted from in the brief of appellants (p. 64) and therefore approved by them :

In *Noble v. Union River Logging Railroad Co., supra*, a bill in equity was filed by the railroad company to enjoin the Secre-

tary of the Interior and the Commissioner of the General Land Office, just as in this case, from executing a certain order revoking the approval by the Secretary of the Interior of the plaintiff's maps for a right of way over the public lands, and also from molesting plaintiff in the enjoyment of such right of way secured to it under an act of Congress. The defendants claimed (p. 172) that the approval was secured by the fraudulent representations of the plaintiff and that it was competent for the Secretary's successor to revoke the approval thus obtained.

The similarity of that case to the case at bar is striking.

There the Secretary attempted to revoke his predecessor's approval directly on the ground that it was obtained by fraud. Here it is sought to do the same thing indirectly on the same ground.

In the case cited, the court said (p. 172):

> "At the time the documents required by the act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, amongst other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the act of Congress. Upon being satisfied of this fact, and that all the other requirements of the act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands. * * * *Frasher v. O'Connor*, 115 U. S., 102."

So in the case at bar, as was said by the Supreme Court in *Shaw v. Kellogg, supra*, with reference to another of these Baca Floats: "It was a question for its action and its action at the time," referring to the Land Department to decide at the time. Having decided, the title then passed and nothing

that occurred afterwards could devest it, since, as was said in *Shaw v. Kellogg*, *supra*, (p. 332), it is not to be believed that Congress intended to betray the claimants by holding out to them an offer of land which land should be taken away from them if it was afterwards discovered not to be such as they were entitled to select.

The Court in the *Noble Case*, *supra*, continued (p. 173):

> "It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example * * * or the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable merely, but void, In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding."
>
> (p. 174) "This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases, it is held that if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the Land Department had no jurisdiction over it and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding. * * *"
>
> (p. 176) "The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the

> plats, the first section of the act vested the right of way in the railroad company. * * * The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. *Moffat v. United States*, 112 U. S., 24; *United States v. Minor*, 114 U. S., 233. A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice GRIER, in *United States v. Stone*, 2 Wall., 525, 535: 'One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court.' *Moore v. Robbins*, 96 U. S., 530."

In the case at bar the land officers seek to do indirectly exactly what it was sought in the foregoing case to do expressly. In the case at bar the Surveyor General of New Mexico on June 17, 1863, in his certificate (Rec., pp. 157, 158) said: "Said location is hereby approved;" and the Commissioner of the General Land Office on April 9, 1864, (Rec., pp. 299-301), either having the papers he required before him, for he says (Rec., p. 300): "The foregoing statement and the certificate of Surveyor General Clark having been submitted to this Department and having undergone a careful examination, the location being approved by him to perfect title under the authority of the act approved June 21, 1860, application for survey having been made, instructions (copy herewith attached) have been given to Surveyor General Levi Bashford of Arizona * * * to run the lines indicated and forward complete survey and plat to be placed on file for future reference as required by law," or, as was said by the Supreme Court (*Shaw v. Kellogg*, *supra*),

"perceiving that its original instructions had been strictly complied with; that no money had been appropriated by Congress for actual exploration of the lands; that no way was open for securing further evidence as to their character; that the time within which any other location could be made had passed; that it was the right of the locators to have the question settled and the title confirmed or rejected, ordered the closing of the matter, the passage of the title, * * * ordered a survey to define the outboundaries."

The Court below (Rec., p. 308) very properly said:

> "The Court will take judicial notice of the condition of the country at that time, and consider as well the facts from the record in this case. It was in the midst of the Civil War; the territory where this land was selected was inhabited by hostile Indians or subject to raids by them; the selection was made in unsurveyed lands; the grantees were receiving value, or supposed value, for the grants that they had relinquished; and it may well be that the Commissioner made up his mind, before the receipt of the said certificates, that no more definite information could be obtained, than that contained in the application itself, signed by John S. Watts, attorney for the heirs, and the statement of the Surveyor General. That definite information could not be had without the survey, and that, as respects this particular portion or tract the Commissioner would waive the requirements of the instructions before given by him as to the manner of proof for ascertaining the character of the land."

The Court below therefore held as a fact that the title passed to the heirs of Baca when the decision of the Commissioner was made on April 9, 1864 (Rec., p. 308).

This makes the decision in *Noble v. Union River Logging Railroad Co.*, *supra*, practically a controlling precedent in appellees' favor.

A list of cases sustaining the right to maintain this suit is given at the end of Point II., *infra*.

So in *Gale v. Best*, 12 Am. St. R., 44, the court points out (p. 45) that when the Land Department has done what it was called on to do, it is conclusive of the character of the land.

Theory of the Appellants' brief.

The whole argument of the brief is based upon the theory that the United States had not been devested of title to the land embraced in the 1863 location.

The appellees admit that if this were so they would have no standing in Court, but they insist that the United States was devested of title when the decision of April 9, 1864, was made, and that the Land Department then lost jurisdiction and that the action of Commissioner Edmunds of April 9, 1864, can only be attacked in a direct proceeding (*Noble v. Union River Logging Railroad*, 147 U. S., 165, 176; *Peyton v. Desmond*, 129 F., 1, 9).

Cases relied upon by the Appellants and Cases Distinguished.

It is submitted that the cases relied upon by the appellants are all distinguishable from the case at bar in that in them there had been no final action, as here, by the officers of the Land Department and the title was still in the United States.

It is said that there are two lines of cases, on either of which the appellees could not maintain this suit. In one it is held that the United States is a necessary party, and in the other that title is still in the United States.

If appellees' contention is correct, neither of these lines of cases is applicable here (Philadelphia Co. v. Stimson, 223 U. S., 605, 620, 622).

In *Plested v. Abbey* (228 U. S., 42), plaintiffs had abandoned former application and title was still in the United States. In this case the principle is stated and cases relied on by appellants shown to be different from case at bar.

In *McKenzie v. Fisher* (39 App. D. C., 7; s. c. 41 W. L. R.,

197), title had not passed out of the United States and the right to make an additional entry was in question.

In *Fisher v. United States* (37 App. D. C., 436); *Champion Lumber Co. v. Fisher* (39 App. D. C., 158; 227 U. S., 445); *McManus v. Fisher* (39 App. D. C., 176); and *Red River Lumber Co. v. Fisher* (39 App. D. C., 181), involved the sufficiency of a protest or contest, the Land Department still has jurisdiction on account of title not having passed out of the United States, and there was before the Department for decision a matter requiring the exercise of discretion, with which admittedly the Courts have nothing to do, and which distinguishes those cases from the case at bar.

In *Ness v. Fisher*, 223 U. S., 683, title was still in the United States and the question to be passed upon was the right of an applicant to make a timber and stone entry.

In *Minnesota v. Hitchcock*, 185 U. S., 373, the Congress had specially provided that it would litigate any questions involving Indian title, and the case was upheld on the ground that the United States had consented to be sued.

In *Oregon v. Hitchcock*, 202 U. S., 60, the title was still in the Government, and the Court held that until the legal title passed from the Government any inquiry into equitable rights was within the cognizance of the Land Department, and that in that instance the United States not having consented to be sued the demurrer must be sustained.

In *Louisiana v. Garfield*, 211 U. S., 70, there was a question of fact as to whether the State had taken and held possession under the grant, and also certain questions of law as to whether the United States had been devested of title, and therefore the United States was entitled to be heard, and had not consented to be sued, the Court saying (p. 78):

> "The United States might and undoubtedly would deny the fact of such possession, and that fact cannot be tried behind its back."

In *Riverside Oil Co. v. Hitchcock*, 190 U. S., 316, the Secretary of the Interior still had an official duty requiring the exercise of judgment and discretion to perform, and the Court could not interfere by injunction or mandamus with him in the performance of such duty.

In *Knight v. United States Land Ass'n.*, 142 U. S., 161, the action of the Secretary in setting aside the Stratton survey and ordering a new survey by Von Leicht was made prior to the devesting of the United States of title, and was within his authority. The point for which this case is cited—that title does not pass until survey—is not supported by it, and numerous cases hold to the contrary, as in the case of railroad grants, swamp land grants and private land grants (*Noble v. Union River Logging Railroad Co., supra ; Frasher v. O'Connor, supra*).

In *Litchfield v. Register and Receiver*, 9 Wall., 575, title was still in the United States, and the Court held that the Land Office was acting within its authority and could not be enjoined or mandamused by the Court ; but the facts in that case distinguish it from the facts in this.

In *Dredging Co. v. Morton*, 28 App. D. C., 288, and *Irrigation L. & I. Co. v. Hitchcock, id.*, 587, it was sought to enjoin continued trespasses upon lands outside of the District of Columbia, and the Court held in the former that it was an attempt to try title to the land in Maryland ; and in the second that there was nothing shown to warrant the exercise of extraordinary jurisdiction of equity *in personam*, notwithstanding the title to the land to be affected was in another jurisdiction.

In *Kirwin v. Murphy*, 189 U. S., 35, an injunction was sought to prevent the survey of lands between a false meander line and a lake. The Court held that the Land Department necessarily had jurisdiction to determine what are public lands, but said (p. 54) : "Possessed of the power, in general,

its exercise of jurisdiction cannot be questioned by the courts before it has taken final action."

That is exactly what distinguishes the case at bar from appellants' cases. Here the action of the Commissioner of April 9, 1864, was final. It devested the United States of title.

In *United States ex rel. Knight v. Lane*, 228 U. S., 6, 11, the action was interlocutory not final and the time for application for rehearing had not expired.

To say that the only necessary prerequisite to a valid patent was the existence of land subject to be patented and that, therefore, the officers of the Land Department always had jurisdiction to determine whether lands were public lands or not would deprive the Courts of jurisdiction in all cases.

It is submitted that from the foregoing it is clear that the assignment of errors of the appellants in the first group do not raise any questions which would justify the Court in reversing the decree appealed from; but, on the contrary, that, under the decision in *Noble v. Union River Logging Railroad Co.*, supplemented by the decision in *Shaw v. Kellogg*, *supra*, the affirmance of the decree appealed from is required.

Having in the foregoing called attention to the salient defects in the position of the appellants, the appellees will now present their side of the case.

II.

The title to the land in question vested in the heirs of Baca the predecessors in title of the appellees April 9, 1864, and the United States was then devested of any title to the land.

Legislation leading to grant.

By the act of July 22, 1854 (10 Stat., 308), the Congress established the office of Surveyor General for New Mexico,

and by Section 8 provided that: "It shall be the duty of the Surveyor General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico," and by Section 9 that: "Full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for fully carrying into effect the several provisions of this act."

Pursuant to said act the Secretary of the Interior on August 25, 1854, issued to the Surveyor General certain rules and regulations (Public Domain, pp. 394-398).

Pursuant to said act and rules and regulations the Surveyor General investigated the claims of the heirs of Luis Maria Cabeza de Baca, and on December 18, 1858, reported to Congress that the claims of said heirs to a tract of land claimed also by the town of Las Vegas was valid but that a conflicting claim of Las Vegas also appeared to be valid.

Thereupon the Congress by an act of June 21, 1860 (12 Stat., 71) confirmed the claims of the town of Las Vegas and the heirs of Baca and provided by Section 6 of said act, the heirs of Baca having surrendered their claim to the tract claimed by the town of Las Vegas in favor of the town,

> "That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number; and it shall be the duty of the Surveyor General of New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them, provided, however, that the right hereby granted shall continue in force for three years from the passage of this act, and no longer."

By whom United States represented in making selection.

It will be observed that no provision was made for the determination as to whether the land selected by the heirs of Baca was vacant and not mineral by any officer of the Government. That there must be action by some one on behalf of the Government before the title to the land would vest in the heirs of Baca is plain (*Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 112 F., 4, 15–17; aff'd 190 U. S., 301, 312). The general jurisdiction over the public lands had been placed by Congress in the General Land Office, and in the absence of any specific provision the Commissioner of the General Land Office was the proper person to act on behalf of the Government (*Fisher v. United States ex rel. Grand Rapids T. Co.*, 37 App. D. C., 436; *Catholic Bishop v. Gibbon*, 158 U. S., 155; *United States v. McClure*, 174 F., 510, 511).

Action taken by Land Department.

The Commissioner of the General Land Office, therefore, on July 26, 1860, issued instructions (Rec., pp. 5, 6) to the Surveyor General of New Mexico with regard to the manner of giving effect to the act of June 21, 1860, in which instructions the following occurred:

> "In either case the final conditions of the certificate to this office must be accompanied by a statement from yourself and Register and Receiver that the land is vacant and not mineral."

Thereafter, on June 17, 1863, the heirs of Baca selected the land in suit here and presented their application to the Surveyor General of New Mexico (Rec., p. 157).

On the same day the Surveyor General made a certificate in which he said: "Said location is hereby approved," and on the next day enclosed said application and certificate in a letter to the Commissioner of the General Land Office, in

which he stated that as the location was far beyond any of the public surveys he had not deemed it necessary to procure any certificate from the Register and Receiver of the Land Office (Rec., pp. 157–159).

Surveyor-General of New Mexico proper officer to pass on selection.

The appellants claim that the application should have been made to the Surveyor General of Arizona and that at the time the Surveyor General of New Mexico had no authority to act in the matter (Rec., pp. 33, 34, 47, 48, 148-152; brief, pp. 37, 38).

Such claim is not sound for the following reasons:

FIRST. By the act of March 3, 1853 (10 Stat., 244), entitled "An Act to Provide for the Survey of the Public Lands in California * * * and for other purposes" it is provided (Sec. 10) that:

> "Except where the President of the United States shall see cause otherwise to determine, each officer to be appointed in virtue of this act, and also every other like officer of the United States, may continue in the uninterrupted discharge of his regular official duties, and is hereby authorized accordingly so to act after the day of expiration of his official commission and until a new commission shall be issued to him for the same office, or otherwise until the day when a successor shall enter upon the duties of such office."

SECOND. Because it was evident that Congress did not intend that the newly appointed Surveyor General of Arizona should supersede the Surveyor General of New Mexico, for in the act of February 24, 1863 (12 Stat., 665), it provided (Sec. 2) that: "Until the Surveyor General takes up active duties within the Territory no salary shall be due or paid;" and

THIRD. The Surveyor General of Arizona did not open an office in Arizona until January 25, 1864 (Rec., p. 156).

A further reason is that the act of June 21, 1860, expressly designated the Surveyor General of New Mexico as the officer of the Government upon whom the demand for the survey should be made.

And the land department declared in the Commissioner's letter of April 9, 1864 (Rec., p. 299), the Surveyor General of New Mexico to be the officer "under whose jurisdiction the application properly came at the date of the approval;" and emphasized it by recognizing (Rec., p. 300) that the Surveyor General of Arizona "in which territory the lands now are" was the proper officer to make the survey.

Action of Commissioner of the General Land Office.

Upon receipt of the letter of the Surveyor General of New Mexico of June 18, 1863, the Commissioner of the General Land Office on July 18, 1863 (Rec., pp. 159, 160), wrote the Surveyor General that his approval had ignored the imperative condition that the land was vacant and not mineral, and stating that it was necessary before the application could be approved that the instructions of July 26, 1860, should be complied with by furnishing a statement from the Surveyor General himself and the Register and Receiver that the land was vacant and not mineral.

On April 2, 1864, the Surveyor General of New Mexico wrote the Commissioner of the General Land Office (Rec., pp. 160–162), stating that the land not having been surveyed there was no evidence in his office as to whether it was mineral or occupied, and that he did not believe there was any in the office of the Register and Receiver, and that he was personally unacquainted with that region of country, and could not certify that the land was vacant and not mineral, or otherwise; and that these facts could only be determined by actual examination and survey.

On March 25, 1864, the Register and Receiver made their certificates (Rec., pp. 163, 164); the one stating that from all

the information in his office the land was vacant and not mineral, and the other that so far as the records of his office showed the land was vacant and not mineral (not having been surveyed).

When he wrote the letter of April 2, 1864, the Surveyor General was in Washington (Appellants' Brief, p. 30), and the Commissioner may have personally conferred with him, and as the Court said in *Shaw v. Kellogg* (p. 337), finding that nothing more could be learned and that the three years had expired, acted.

On April 9, 1864, the Commissioner of the General Land Office issued an order for the survey (Rec., pp. 299–301).

Time of Receipt of Certificates of Register and Receiver.

The Court's attention is particularly directed to the letter of the Surveyor General of April 2, 1864, and the certificates of the Register and Receiver, and of the order of April 9, 1864. This is earnestly requested because certain inferences are fairly to be deduced from them which establish the appellees' contention and disprove that of the appellants.

The appellants claim that the Commissioner of the General Land Office did not have the certificates of the Register and Receiver before him at the time he made the order of April 9, 1864 (Rec., p. 34), and that such certificates were not received at the General Land Office until May 26, 1864 (Rec., p. 49), from which they deduce the argument that the direction for the survey was made merely in compliance with the suggestion of the Surveyor General, that the fact as to whether the land was vacant and not mineral could only be determined by "actual examination and survey," and that it was not an approval of the location. The Commissioner treated it as an approval and said no word about examination in his order.

It appears (Rec., pp. 162–164) that the certificates of the Register and Receiver were enclosed in a letter from John S.

Watts to W. Wrightson, dated Santa Fe, New Mexico, March 27, 1864. There was, therefore, plenty of time for the certificates to have reached Washington and have been submitted to the Commissioner before April 9, 1864. It is much more probable that the certificates would have reached Washington within thirteen days than that they would have been delayed sixty days, according to the defendants' contention.

An examination of the papers themselves confirms this. The original of the letter of the Surveyor General of New Mexico, dated April 2, 1864, was admittedly written in Washington and received at the Land Office April 4, 1864 (Rec., pp. 19, 161, 162).

Upon the face of the letter in connection with the last paragraph is a cross referring to a cross on the margin of the letter, where is written the statement "See letter Honorable Watts enclosing certificates R. and R." Further, upon the back of the letter is an endorsement. See Watts' letter "*intra.*" (Addition to Record in Court of Appeals, pp. 1, 2).

The foregoing is almost demonstrative proof that the certificates were considered at the same time that the letter of April 2, 1864, was considered by the Commissioner of the General Land Office.

If it were necessary, further evidence of the fact is found in the action of the Commissioner, who had declared in his letter of July 18, 1863, that such certificates were "necessary" to the approval by his office. There has been ample time to get and forward them; they had been procured in time to be forwarded; and he acts just about the time that they would have reached Washington. The only proof—if it can be called proof—offered by the defendants in support of their position that the certificates were not before the Commissioner, is the office stamp upon the letter of Watts to Wrightson, dated March 27, 1864. This is no evidence at all and is easily explained on the theory that just as in the *Shaw-*

Kellogg Case, supra (Transcript of Record, that case, p. 39), the Commissioner sent the letter of Watts to Wrightson, together with the letter of April 2, 1864, of the Surveyor General and the certificates of the Register and Receiver to the Surveyor General of Arizona with his letter of April 9, 1864, and that they are the papers refered to in the letter of April 9, 1864, as "The papers herein enclosed"; and that after they had served their purpose in being sent to the Surveyor General they were returned to the General Land Office, and when it was returned the letter was stamped "May 26, 1864."

In the transcript of the record a certified copy of a letter of the Second Assistant Postmaster General appears (Rec., p. 144). This was not put it evidence, is not marked, nor were plaintiffs afforded any opportunity to examine the writer; and it merely purports to suggest what might have happened, admitting that the department has no way of determining the actual time. It should be disregarded.

But as a matter of law it is immaterial whether or not the certificates were before the Commissioner. As stated, he made the rule requiring them and he could dispense with that portion of the rule. He was the officer authorized by law to pass upon the question whether the heirs of Baca were entitled to the land selected and he could act on whatever evidence he saw fit.

In Shaw v. Kellogg, *supra* (pp. 336, 337), the Court said:

> "But one conclusion can be deduced from these proceedings, and that is, that the Land Department, perceiving * * * that no way was open for securing further evidence as to their character; that the time within which any other location could be made had passed; that it was the right of the locators to have the question settled and the title confirmed or rejected, ordered the closing of the matter, the passage of the title * * *."

Title to land passed to heirs of Baca April 9, 1864.

The appellees contend that under the Sixth Section of the Act of June 21, 1860, the heirs of Baca, upon selection and location of the land on June 17, 1863, became entitled absolutely to the title to such land; and that to complete their title it was only necessary for the Commissioner of the General Land Office, subject to such rules and regulations as had been established under the statutes relating to the Department, or such mode of procedure as he saw fit to adopt in the particular case, to ascertain whether in fact the land was such as the heirs of Baca were entitled to select and locate, and having ascertained the fact his decision directing their segregation from the public domain by survey was the final act which devested the United States of title.

After April 9, 1864, the heirs of Baca were in the position of owners of a certain portion of the public domain, but the Government did not until the survey of 1905 adjust the lines of the selection to the public surveys so that the representative of the heirs of Baca could enter into possession.

The action of the Commissioner of the General Land Office was final since no appeal was taken to the Secretary of the Interior and he was not called upon to exercise his supervisory power in the matter. The General Land Office is an independent bureau of the Interior Department in matters of public lands, and the Secretary only exercises his supervisory power when called upon to do so.

Making, Approving and Filing of Survey not Prerequisite to Passing of title.

The appellants seek (brief, pp. 51–57) to maintain that the acceptance by the Department and the filing of the approved plat and field notes of a survey whereby the Surveyor General made location of the selection of lands, reporting them as vacant and non-mineral at the date of selection, were necessary to the passing of the title under the act of June 21, 1860.

This is not supported by the authorities cited. The cases refer to confirmed foreign grants and this is a grant by the United States. The appellants admit that between the two there is a material difference. *Hornsby v. United States*, 77 U. S., 224, holds that actual survey or other authentic means —description by natural objects and courses and distance as required—was sufficient.

The contention is claimed to be supported by the decision of the Supreme Court of the United States in *Shaw v. Kellogg, supra*, in which the land department in its letter of November 2, 1863, returning the contract for survey said "evidence of the fact that the land was vacant and non-mineral *must be first furnished.*"

In that case (p. 318) on December 12, 1863, the Surveyor General of Colorado transmitted his certificate and that of the Register and Receiver that from good and sufficient evidence they were satisfied that the land was vacant and not mineral.

On January 16, 1864 (p. 319), the Commissioner of the General Land Office wrote that the evidence was not sufficient ; but on February 12, 1864 (p. 320), *without having received any further evidence*, the same Commissioner wrote directing the Surveyor General to check up a private survey and upon finding it correct to approve the same, with a reservation that it did not embrace any mineral land or interfere with any other vested rights.

It was this decision of the Commissioner that the Supreme Court held in *Shaw v. Kellogg, supra*, as to Baca Float No. 4 devested the United States of title.

The appellants' brief is not correct (p. 47) in stating that "It was not what was done in 1863 that passed title but what was done in 1864." The Supreme Court held that the decision of the Commissioner in 1864, it is true, passed the title but he did not have before him then anything except the certificates made in 1863.

Moreover the Supreme Court held that the decision of the

Commissioner passed the title notwithstanding that it also held that the attempted reservation was a nullity.

An examination of the *Shaw-Kellogg* case shows that not only had no survey been made, approved or filed showing that the land was vacant and not mineral, but, on the contrary, that contrary to the orders of the Department a survey had been made by a surveyor employed by the claimant which did not purport to show the character of the land; and that the Commissioner required the evidence as to the character of the land as a prerequisite to the survey. Notwithstanding that there had been no acceptance by the Department and no filing of an approved plat, etc. (brief in that case, p. 52), the Department wrote February 12, 1864 (170 U. S., 321):

> "The difficulty, however, may be avoided by pursuing the following course: The original field notes, duly verified and authenticated, must be filed in the surveyor general's office at Colorado; upon bringing these to the usual satisfactory tests, and finding the same all regular and correct you are authorized in virtue of the aforesaid sixth section of the said act of 21st June, 1860, to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights if such exist."

It was as to this attempted limitation that the Court used the language (pp. 336, 337), concluding (p. 337):

> "and sought to protect the interests of the Government and guard against any criticism of its action by directing an entry in the certificate of approval that it was made subject to the conditions and provisions of the act of Congress."

The Court held (p. 337) that the reservation was futile, and "There was a finality so far as they (the officers of the Land Department) were concerned."

Indeed, the appellants apparently have misread the *Shaw-Kellogg case.* They argue in the brief (pp. 47, 48) that what was done in 1864 passed the title. As a fact there was nothing supplied to the Commissioner after the certificates of the Surveyor General and the Register and Receiver were furnished in December, 1863. The Court says that the Commissioner, having before him all that he had required, was under a duty to act; and he did act upon the evidence furnished in 1863. His actual decision, it is true, was dated February 12, 1864, and after he had on January 12, 1864, demanded further evidence as to the character of the land and stated that the approval would be suspended until that evidence was obtained. But no further evidence was, in fact, obtained, and the action of February 12, 1864, was clearly a withdrawal of his request for further information. The survey used for segregating this Float was not one subsequently made, and when approved by the Surveyor General and thereafter filed by the Department amounting to a ratification, as contended (brief, p. 47), but was a private survey previously made and merely utilized for the purpose of segregating the lands from the public domain.

The trial court held in the decision upon the demurrer (Rec., p. 28) and again in its final decision (Rec., p. 308) that when the location was approved and survey ordered by the Commissioner of the General Land Office title passed to the heirs of Baca and this is also the decision of the Court of Appeals (Rec., p. 350).

The decision in *Shaw v. Kellogg (supra),* is to the same effect.

This position is supported by the act of June 2, 1862 (12 Stat., 410), which provides:

> "* * * nothing in the law requiring the executive officers to survey land claimed or granted under any laws of the United States shall be construed either to authorize such officers to pass upon the validity of the

> titles granted by or under such laws or to give any greater effect to the survey made by them than to make such surveys *prima facie* evidence of the true location of the lands claimed or granted, nor shall any such grant be deemed incomplete for the want of a survey or patent when the land granted may be ascertained without a survey or patent."

That the land in this case could be ascertained is plain from the fact that the Contzen survey was made from the description without difficulty.

The argument that the description is indefinite and that therefore a survey was necessary is similar to that made in *Shaw v. Kellogg, supra* (Transcript of Record, that case, pp. 112, 134).

That a survey is not necessary to give title is established by numerous cases, including those making railroad land grants, the Swamp Land acts, and acts similar to the one here in question.

The purpose of the survey is merely to segregate the land from the public domain (Rec., pp. 77, 78, 350).

Though the title passed from the Government at the latest April 9, 1864, the survey by the Government of the land was necessary to segregate the land from the public domain (*Stoneroad v. Stoneroad*, 158 U. S., 240) and to fix its outboundaries, and until the survey was made and completed by filing in the Land Office (*Clearwater Timber Co. v. Shoshone County, Idaho*, 155 F., 612) the owners of the land under the Baca title were unable to take possession of it, or, in case of persons being in possession, to proceed by proper legal action to obtain such possession.

The argument on behalf of the appellants that the Sixth Section of the Act evidently required a survey to be made before title passed, and that the word "located" used twice in this section was used with a colloquial meaning in the first instance and with a techical meaning in the second is unsound.

It is also contradicted by the action of the Land Office in the construction it placed upon that section when it gave the instructions of July 26, 1860. The Comissioner there assumes that the heirs of Baca might locate by selecting according to the existing lines of the surveys, in which case the Surveyor General was merely to make a certificate designating the parts selected, by legal divisions or sub-divisions, or that the heirs might select outside of the existing surveys, in which case they were required to give

> "such distinct descriptions and connections with natural objects in their applications to be filed in your office as will enable the Deputy Surveyor when he may reach the vicinity of such selections in the regular progress of the surveys, to have the selections adjusted as near as may be to the lines of the public surveys which may hereafter be established in the region of those selections."

One of the five Baca floats came before the Supreme Court of the United States in the case of *Shaw v. Kellogg, supra.* As has been stated, the Court below held that the decision of the Supreme Court in that case practically controlled the decision in the case at bar.

In that case the facts were as follows:

One Gilpin, having secured the rights under Baca Float No. 4, caused John S. Watts, on December 12, 1862, to select certain land in a portion of the territory of New Mexico, which had been organized as the Territory of Colorado.

The application was addressed, just as the one in the case at bar was, to "John A. Clark, Surveyor General of New Mexico," but without acting upon it General Clark sent a copy to the Surveyor General of Colorado and a copy to the Land Office.

Thereafter action upon the application was taken by the Surveyor General of Colorado.

The appellants' attempt to make some point of this

(brief, pp. 37, 38), apparently overlooking the fact that when the application in the case at bar was presented to General Clark there was no Surveyor General of Arizona in office to whom the application could have been sent, and that the newly appointed Surveyor General of Arizona, Mr. Bashford, did not arrive at Tucson, or open an office, until January 25, 1864 (Rec., p. 156). Thereafter the proceedings with regard to Baca Float No. 3 were through Mr. Bashford.

Going back now to the *Shaw-Kellog case*. The Surveyor General of Colorado in transmitting the application informed the Land Office that he presumed the selection had been made by Mr. Gilpin, as Mr. Gilpin had stated that he was in possession of one of the Baca floats and should locate it as No. 4 was located, for the reason that in his opinion it would cover rich minerals in the mountains.

Under these circumstances the Department, under date of March 13, 1863, instructed the Surveyor General that before the application could be approved it must be accompanied by his certificate and the certificates of the Register and Receiver that the land was vacant and not mineral, and that the character of the land as to minerals should be especially ascertained after the statement of Mr. Gilpin.

Mr. Gilpin made application to the Surveyor General to survey the tract and, as the land was beyond the limits of the public surveys, the Surveyor General made a contract for its survey, which, however, the Land Department on November 2, 1863, returned stating that evidence of the fact that the land was vacant and non-mineral *must first be furnished*.

On December 12, 1863, the Surveyor General transmitted his certificate that from good and sufficient evidence he was satisfied that the land was not mineral and vacant, and enclosed a similar certificate from the Register and Receiver.

On January 16, 1864, the Land Office replied that the certificates were not sufficient as they were not based upon actual

knowledge of the facts but upon information and conclusions deduced from reason.

Without having received any further evidence than the certificates furnished in December, 1863, on February 12, 1864, the Land Office again wrote the Surveyor General stating that it had considered the matter and that the original field notes made under the contract of survey above referred to, upon being duly verified and authenticated, should be filed in the Surveyor General's office, and upon bringing these to the usual satisfactory test and upon finding the same all regular and correct he was authorized to approve the survey with a reservation that the land was such as the statute contemplated.

Thereafter the field notes of the survey with the certificate of the Surveyor and his assistants were duly filed in the Surveyor General's office and approved by him, his certificate stating that they had been critically examined, the necessary corrections and explanations made, and that the said field notes and survey were approved.

In the general description accompanying the field notes is a description of the land, in which nothing is said with regard to whether the land is vacant or not; and the only reference to its mineral character is the statement "saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle."

Upon these facts the Court said (p. 332):

> "The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. * * * We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should

be rendered nugatory by any future discoveries of mineral. * * *"

(p. 333.) "How was the character of the land to be determined, and by whom? The surveyor general of New Mexico was directed to make survey and location of the lands selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select. * * * We do not mean that Congress thereby created an independent tribunal outside of and apart from the General Land Department of the Government. On the contrary, the act of 1854, provided that he should act under instructions from the Secretary of the Interior, and so undoubtedly, in proceeding to make survey and location as required by section 6 of the act of 1860, he was still subject to the control and direction of the Land Department; but while he was not authorized by this section to act in defiance or independently of the Land Department, he was the particular officer charged with the duty of making survey and location, and it was for him to say, in the first instance at least, whether the lands so selected, and by him surveyed and located, were lands vacant and non-mineral. * * *

"It will also be perceived that the surveyor general, as well as the register and receiver of the land office, each certified" (in 1863, p. 318), "that the land was non-mineral." * * *

(p. 336.) "Obviously the Land Department, after sending the letter of January 16" (1864) "reconsidered its action. It had received the certificate of the register and receiver, and had before it all the certificates required by the original letter of instructions, and instead of continuing the suspension of an approval for further proof, as indicated by the letter of January 16, it wrote, on February 12, to close the matter up, pointing out how all the difficulties which stood in the way could be removed. * * * But one conclusion can be deduced from these proceedings, and that is that the Land Department, perceiving that its original instructions had been strictly complied with; that no money had been appropriated by Congress for

actual exploration of the lands; that no way was open for securing further evidence as to their character; that the time within which any other location could be made had passed; that it was the right of the locators to have the question settled and the title confirmed or rejected, ordered the closing of the matter, the passage of the title, and sought to protect the interests of the Government and guard against any criticism of its action by directing an entry in the certificate of approval that it was made subject to the conditions and provisions of the act of Congress. * * *

(pp. 342, 343): "Summing up the whole matter it results in this: Congress in 1860 made a grant of a certain number of acres, authorized the grantees to select the land within three years anywhere in the Territory of New Mexico, and directed the surveyor general of that territory to make survey and location of the land selected, thus casting upon that officer the primary duty of deciding whether the land selected was such as the grantees might select. They selected this tract. Obeying the statute and the instructions issued by the Land Department that officer approved the selection and made the survey and location. The Land Department, at first suspending action, finally directed him to close up the matter, to approve the field notes, survey and plat, and notified the parties through him that such field notes, survey and plat, together with the act of Congress, should constitute the evidence of title. All was done as directed. Congress made no provision for a patent and the Land Department refused to issue one. All having been done that was prescribed by the statute, the title passed. * * *"

In conclusion, it is submitted that the United States was devested of title by the decision of the Commissioner of the General Land office of April 9, 1864, and title was vested thereby in the heirs of Baca.

The title to the land in question passed out of the United States, and thereupon all authority or control of the executive department over the land and over the title, which has been con-

veyed, ceased. The functions of the Land Department cease when the title passes out of the United States and the jurisdiction of the Courts then attach (*Noble v. Union River Logging R. R. Co.*, 147 U. S., 165, 176; *Peyton v. Desmond*, 129 F., 1, 8). In such a case the United States is not a necessary party (*Philadelphia Co. v. Stimson*, 223 U. S., 605, 620), and the rule that the United States cannot be sued without its consent has no application, because in such a case the officers are not sued as or because they are officers of the Government but as individuals, and the Court is not ousted of jurisdiction, because they assert authority as such officers.

Philadelphia Co. v. Stimson, 223 U. S., 605, 622.
Allen v. Balto. & Ohio R. R. Co., 114 U. S., 311.
Cunningham v. Macon & B. R. Co., 109 U. S., 446.
United States v. Lee, 106 U. S., 196.
Board of Liquidation v. McComb, 92 U. S., 531.
Davis v. Gray, 16 Wall., 203.
Thomason v. Wellman & Rhoades, 206 F., 895.
Texas Co. v. Central Fuel Oil Co., 194 F., 1.
Wadworth v. Boysen, 148 F., 771.
Parsons v. Marye, 23 F., 113, 117.

See, also,

Ex Parte Young, 209 U. S., 123.
School of Magnetic Healing v. McAnnulty, 187 *id.*, 94.
Belknap v. Schild, 161 *id.*, 10.
Pennoyer v. McConnaughy, 140 *id.*, 1.
Virginia Coupon Cases, 114 *id.*, 269.
Louisiana v. Jumel, 107 *id.*, 711.
Kendall v. United States, 12 Pet., 524.
Osborne v. Bank of U. S., 9 Wheat., 738.
Central of Ga. Ry. Co. v. R. R. Com. of Ala., 161 F., 925.
Wiener v. Louisville W. Co., 130 F., 261.

As has been shown under Point. 1. the authorities cited by appellants do not controvert this position.

This disposes of the assignment of errors in the second group.

III.

The appellees deraign title from the heirs of Baca.

The appellants contend that the appellees did not prove title because they did not show that the persons who executed the deed, or on whose behalf the deed of May 1, 1864, to John S. Watts (Rec., pp. 316, *et seq.*, Plaintiffs' Exhibits A. H. Nos. 1, 13, 14, 17) was executed, were the heirs of Luis Maria Cabeza de Baca.

The appellants offered no proof attacking the said deed though when it was offered in evidence they did make certain objections thereto.

This deed is the source of the appellees' title and, under the authorities, being over thirty years old and bearing no suspicious *indicia*, is admissible in evidence without proof of execution, and establishes its genuineness and the fact of its execution by the parties who purport to execute it, and the authority of the attorney-in-fact will be presumed without proof, and the certificate of acknowledgment is conclusive, in the absence of fraud or duress, of the facts which the officer taking the acknowledgment was empowered to certify, which includes the identification of the parties executing the instrument (Rec., p. 352; *Foote v. Brown*, 81 Conn., 218; *McMahon v. McDonald*, 113 S. W., 322; *Hodge v. Palms*, 117 F., 396; *McDonald v. Hanks*, 113 S. W., 604; *Goodhue v. Cameron*, 127 N. Y. S., 120; *Ford v. Ford*, 27 App. D. C., 401).

In *Foote v. Brown*, 81 Conn., 218, defendants claimed that Pipe Beach had been used for over sixty years and up to the present time by the public generally for the purpose of getting shells and other things for fertilizing; but nevertheless the Court, referring to a deed which conveyed Pipe Beach and the adjoining farm land to Brown, said (p. 228):

> " God forbid that ancient grants and acts should be drawn in question although that cannot be shown which

was at first necessary to the perfection of the thing (*Fowler v. Savage*, 3 Conn., 90, 98). Antiquity of time fortifies all titles and supposeth the best beginning the law can give them (*Ellis v. Mayer*, 15 C. B. N. S., 52–77)."

In *McMahon v. McDonald*, 113 S. W., 322, the court said (p. 325) :

> " No actual possession was shown in any of the parties, plaintiffs or defendant or his vendor. But it was shown that the land was wild and unimproved land."

In *Hodge v. Palm*, 117 F., 396, the court said (p. 398) :

> " True, there was no proof of possession of the subject of the grant, but there is evidence of contemporaneous official acts which satisfies us that the instruments are genuine ; and proof of possession, which some of the authorities indicate should be required as a condition to the admission of ancient records and documents without further proof, is required solely to fortify and give credit to the instruments when offered in evidence. Upon the question whether confirmatory proof of acts of possession should be required at all, where there is nothing to excite suspicion of the genuineness of the instrument, the cases are somewhat conflicting. Greenleaf in his work on evidence (volume I., §§ 21, 144), states that the weight of opinion is that proof of acts of possession is not necessary."

Wilson v. Snow, 228 U. S., 217, which is cited by appellants for the proposition that possession was necessary in order to make ancient deeds evidence of their execution and of the identity of the parties purporting to execute them, does not sustain the proposition, since it merely mentions the fact that possession did accompany the deed as tending to support the deed.

So in *Baeder v. Jennings*, 40 F., 199, also cited by the appellants for the same proposition, the fact of there having been possession in accordance with the deed was merely corroborative, and the Court in reference to admitting the deed as evidence used this language:

> " And after a lapse of 40 or 50 years, I think that the recitals of the deed are evidence of the facts recited, other things concurring " ;

meaning thereby that if there were no suspicious circumstances connected with it.

With regard to the objection that the deed was not acknowledged in accordance with the laws of Arizona, it is submitted that this Court will take judicial notice of the public statutes of Arizona (*Southern Pac. Co. v. De Valle de Costa*, 190 F., 689; *Chicago & Alton R. R. v. Wiggins Ferry Co.*, 119 U. S., 615; *Bond v. John V. Farwell Co.*, 172 F., 58; *Denver & Rio G. R. R. Co. v. Wagner*, 167 F., 75; *Edwards v. Smith*, 137 S. W., 1161; *Century Digest*, v. 20; "*Evidence*", Sec. 48; *Decennial Digest*, v. 8; "*Evidence*", Sec. 29).

Section 758, Title 12 of the laws of 1901 of Arizona, validates any instrument executed prior to January 1, 1865, and recorded within a year without regard to form or manner of execution.

The deed of May 1, 1864, from the heirs of Baca to John S. Watts was recorded within the year (Rec., p. 320).

Section 759 provides for the re-recording of instruments recorded in the Probate Court of New Mexico or Mexico; and Section 760 provides for re-recording instruments recorded in other counties.

It is submitted that the foregoing makes necessary the overruling of the objections made on this ground to this and other deeds offered in evidence on behalf of the plaintiffs.

The appellees introduced (Rec., p. 322, Plaintiffs' Exhibit A H, No. 2) a deed from John S. Watts to Christopher E.

Hawley, dated January 8, 1870, and acknowledged on the same day before Charles Nettleton, both as Commissioner for Arizona in New York and as Notary Public in and for the City and County of New York, and recorded in Pima County, Arizona, May 9, 1885, conveying to said Hawley

> "All that certain tract, piece or parcel of land, situate, lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., * * * granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864, bounded and described as follows: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north twelve miles, thirty-six chains and forty-four links, running thence east twelve miles, thirty-six chains, and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence west twelve miles, thirty-six chains and forty-four links to the point or place of beginning. The said tract of land being known as Location No. 3 of the Baca Series."

The appellants objected to this deed on the grounds that it was incompetent, irrelevant and immaterial, that no foundation had been laid for its introduction, and upon the further ground that it does not appear to have been executed or acknowledged in accordance with the laws of Arizona in force at the date of the instrument.

It is submitted that the objection—on the ground that no foundation had been laid for its introduction and that it does not appear to have been executed or acknowledged in accordance with the laws of Arizona—should be overruled. As to the objection to its incompetency, irrelevancy and immateriality, so far as this depends upon the description by courses and distances being of the 1866 amended location, that will be discussed later.

The appellees then offered in evidence (Rec., p. 324, Plaintiff's Exhibit A. H. No. 3) the power of attorney from Christopher E. Hawley to James Eldredge, dated January 13, 1870, acknowledged the same day, and recorded in Pima County May 9, 1885.

The appellants objected to this on the grounds that it was incompetent, irrelevant and immaterial, and because it was not executed or acknowledged in accordance with the laws of Arizona; and upon the further ground that no sufficient foundation had been laid for its introduction.

The same remark is made as to this objection as to the preceeding one.

The appellees then offered in evidence (Rec., p. 324, Plaintiffs' Exhibit A. H. No. 15) deed from Christopher E. Hawley, by James Eldredge, his attorney, to John C. Robinson, dated May 5, 1884, and acknowledged the same day, and recorded in Pima County, Arizona, and duly authenticated.

The appellants objected on the ground that the foregoing deed was incompetent, irrelevant and immaterial, and that it related to land not the subject of the suit; that the original is not accounted for, and that it is not shown that the principal, on whose account it was executed, was alive at the date of its execution.

So far as the objection is based on incompetency, irrelevancy and immateriality, it will be discussed later. As to the other grounds, it is submitted that they are not material.

The appellees then offered in evidence (Rec., p. 324, Plaintiffs' Exhibit A. H., No. 4) deed from James Eldredge to John C. Robinson, dated July 7, 1879, and acknowledged the same day, which was objected to on the ground of incompetency, irrelevancy and immateriality, and that no sufficient foundation had been laid for its introduction. This objection will be discussed hereafter.

The appellees then offered in evidence (Rec., p. 325, Plaint-

iffs' Exhibit A. H., No. 6) deed from John C. Robinson to S. A. M. Syme, dated April 30, 1896, acknowledged the same day, and recorded in Pima County, Arizona, on September 25, 1896, conveying the north one-half of 1866 location, to which the appellants objected on the grounds that it was incompetent, irrelevant and immaterial, and that no sufficient foundation had been laid for its introduction. This objection will be discussed later.

The appellees then offered in evidence (Rec., p. 325, Plaintiffs' Exhibit A. H., No. 7) deed from John C. Robinson to Alexander F. Mathews, dated September 22, 1893, acknowledged September 25, 1893, and recorded in Pima County, Arizona, October 12, 1893, conveying the south one-half of 1866 location, to which the same objection was made, and which objection will be hereafter discussed.

The appellees then offered in evidence (Rec., p. 326, Plaintiffs' Exhibit A. H. No. 8) deed from James Eldredge to Alexander F. Mathews, dated September 22, 1893, acknowledged September 30, 1893, and recorded in Pima County, Arizona, October 12, 1893, conveying the south one-half of 1866 location, to which the same objection was made, and which objection will be discussed hereafter.

The appellees then offered in evidence (Rec., p. 328, Plaintiffs' Exhibit A. H. No. 9) deed from Charles A. Eldredge to Alexander F. Mathews, dated September 22, 1893, acknowledged September 28, 1893, and recorded in Pima County, Arizona, October 12, 1893, conveying the south one-half of 1866 location, to which the same objection was made, and which will be discussed hereafter.

The appellees then offered in evidence (Rec., p. 329, Plaintiffs' Exhibit A. H. No. 10) deed from John W. Cameron and Mrs. A. T. Belknap to Alexander F. Mathews, dated September 22, 1893, acknowledged September 28, 1893, and recorded in Pima County, Arizona, October 12, 1893, conveying the south one-half of 1866 location, to which the same objec-

tion was made, and which objection will be discussed hereafter.

The appellees then offered in evidence (Rec., p. 330; Plaintiffs' Exhibit A. H. No. 11) deed from John W. Cameron to Alexander F. Mathews, dated September 25, 1893, anknowledged September 30, 1893, and recorded in Pima County, Arizona, October 12, 1893, conveying the south one-half of 1866 location, to which the same objection was made, and which objection will be discussed hereafter,

The appellees then offered in evidence (Rec., p. 332), Plaintiffs' Exhibit A. H., No. 12) deed from Samuel A. M. Syme to Laura G. Mathews, Eliza Patton Mathews, Mason Mathews, Charles G. Mathews and Henry A. Mathews, devisees of Alexander F. Mathews, deceased, acting in their individual capacity, and the said Mason Mathews, Charles G. Mathews and Henry A. Mathews, acting in their capacity of executors of the will of Alexander F. Mathews, deceased, to C. C. Watts and D. C. T. Davis, Jr., trustees, dated February 8, 1907, acknowledged February 8 and 11, 1907, conveying the selection of 1863, to which the same objection was made, and the additional objection that there was no evidence of the representative capacity of certain of the parties, that the certificate of acknowledgment was not in accordance with the laws of Arizona, and that there was no evidence of authority of the representatives to make the conveyaneo, which objection will be discussed hereafter.

The appellees then offered in evidence (Rec., p. 335, Plaintiffs' Exhibit A. H. No. 16), a duly authenticated copy of the Last Will and Testament of Alexander F. Mathews, deceased, dated September 22, 1900, and the Probate proceedings thereon, to which objection was made on the ground that they were incompetent, irrelevant and immaterial. This last objection, it is submitted, should be overruled.

The appellees then offered in evidence (Rec., p. 336, Plaint-

iffs' Exhibit A. H. No. 17), an authenticated copy of the deed of May 1, 1864, as originally recorded.

The objection that the papers are incompetent, irrelevant and immaterial is based upon the ground that commencing with the deed from Watts to Hawley, and continuing through the deeds down to the deed from Syme and Mathews to Watts and Davis, the land conveyed by courses and distances is the location of 1866. But in all of said deeds, in addition to the description of courses and distances, the land is described as " that granted to the heirs of Baca by the United States, and by said heirs conveyed to Watts by deed dated May 1, 1864, and known as Location No. 3 of the Baca Series," or as " Location No. 3 of the Baca Series."

By stipulation there was introduced, on behalf of the appellees, deeds conveying undivided halves of the 1863 location to the appellees John Watts and James W. Vroom, as to which no objections have been interposed so far as appears on behalf of the appellants so that these two appellees would have title in any event upon the record if the contention of the appellees that the title passed upon the making of the order of April 9, 1864, by the Commissioner of the General Land Office is sound, and the deed to John S. Watts of May 1, 1864, from the heirs of Baca is sufficiently proved.

In the same stipulation a certain deed purporting to convey the land to the Arizona Copper Estate from Alexander F. Mathews and S. A. M. Syme, and a deed of defeasance of the same, executed upon the same day by the Arizona Copper Estate to Alexander F. Mathews and S. A. M. Syme, were introduced in evidence.

Upon the argument the appellees produced by far the greater portion of the notes referred to in the said deed, and it was stated, as is the fact, that none of the notes had been paid, thereby making the deed of defeasance effective.

For these reasons the deed to the Arizoza Copper Estate

is immaterial and the title of Alexander F. Mathews and S. A. M. Syme is not affected thereby.

It is not pretended that the appellants have any title at all to the land in dispute, and consequently, if the appellees have any title at all, it is sufficient in this suit as against the appellants (*Raynor v. Leo*, 20 Mich., 384–388; *Reiley v. Wright*, 117 Cal., 77; *McGorry v. Robinson*, 135 Cal., 312; *Hall v. Kellogg*, 16 Mich., 136; *Newman v. Buzard*, 24 Wash., 225; *Davis v. Cranch*, 123 P., 294; *Horner v. Jarrett*, 137 S. W., 870).

Under the authorities the appellees have at least a *prima facie* title to the land, which is sufficient, because where, as here, the two descriptions contained in the deeds are inconsistent the grantee may rely on that most beneficial to him (*Winter v. White*, 70 N. D., 305; *Buckhannan v. Stuart*, 3 H. & J., 327; *Merriman v. Blalack*, 121 S. W., 552; *Quade v. Pillard*, 112 N. W., 646; *Sharp v. Thompson*, 100 Ill., 447; *Armstrong v. Nudd*, 49 Ky. (10 B. Mon.), 144; *Hall v. Gittings*, 2 H. & J., 112; *Colter v. Man*, 18 Minn., 96); that description which accords with the intention of the parties will be adopted and the other rejected as false or mistaken (*Banks v. Hawkins*, 75 Atl., 617; *Thompson v. Hill*, 73 S. E., 640; *Mylius v. Raines-Andrews Lumber Co.*, 71 S. E., 404; *Bender v. Chew*, 129 La., 849); that which gives effect to the deed rather than that which defeats the deed will be adopted (*Hall v. Bartlett*, 112 P., 176); that applying to the land owned by the grantor will be adopted rather than that applying to land which he does not own (*Piper v. True*, 36 Cal., 606); the deed will be construed as a whole and interpreted in the light of circumstances (*Hubbard v. Whitehead*, 121 S. W., 69); and finally, the deed will be construed most strongly against the grantor (*Vance v. Fore*, 24 Cal., 345; *Marshall v. Niles*, 8 Conn., 369; *L. E. & W. R. Co. v. Whitham*, 155 Ill., 514; *Holmes v. Howard*, 2 H. & M. H., 57; *Carroll v. Nor-*

wood's Heirs, 5 H. & J., 155; *Carrington v. Goddin*, 13 Gratt., 587).

As the grantor never owned the 1886 location, and as it is evident from the language of all the deeds that it was intended to convey Baca Float No. 3 wherever situated, the appellees hold the title as successors to the heirs of Baca to the location of June 17, 1863.

The questions asked of Mr. Davis seeking to show that Watts and Davis held the property in a representative capacity and which were objected to at the time, were properly objected to as being incompetent, irrelevant and immaterial.

The point of the examination was an attempt by the appellants to show that two of the appellees were described in the deed to them in a representative capacity and that they are not suing in such capacity.

An examination of the deed shows that this claim is based upon the bare use of the word "Trustees" after the names of the grantees in the deed. That this does not create a trust or prevent the grantees from taking absolute title is established by a long list of authorities (*Andrews v. Atlanta Real Estate Co.*, 92 Ga., 260; *Combs v. Brown*, 29 N. J. L. (5 Dutch.), 36; *Den. ex dem. Cairns et al. v. Hay*, 1 Zab., 174; *Sansom v. Ayer & Lord Tie Co.*, 144 Ky., 555; *Star v. Minister etc. of Star M. P. Church*, 112 Md., 171; *Schaeffer v. Klee*, 100 Md., 264; *Century Digest*, "Trust," v. 47, Sec. 34; *Decennial Digest*, "Trust," v. 19, Sec. 24 *et seq.*); nor does an agreement to hold the proceeds of the sale of land in trust create a trust in the land (*Talbott v. Barber*, 11 Ind. App., 1; *Dexter v. Macdonald*, 196 Mo., 373).

This disposes of the assignment of error 24 and 25 (Rec., p. 358).

IV.

No error has been shown in the decree appealed from.

Bosque Redondo.

The point make by appellants (Rec., p. 41; brief, p. 26) is that the heirs of Baca, prior to making the selection of June 17, 1863, had exhausted their rights by the selection made on November 18, 1862, at " Bosque Redondo " on the Pecos River in New Mexico.

It is understood that this argument was admittedly made only to meet the contention which the appellants claim to have understood the appellees to make; that is, that title passed upon the approval of the selection by the Surveyor General. Since this is not the contention of the appellees, the appellants, as appellees understand, do not insist upon the argument that the rights of the heirs of Baca were exhausted by the alleged selection and location at " Bosque Redondo."

An examination of the certificates of the Surveyor General and of the Register and Receiver as to the location at Bosque Redondo (Rec., pp. 14, 15) will show that while they state the facts upon which an approval might be based, that is, that the Surveyor General believes the land to be vacant and non-mineral, and that there is nothing in the offices of the Register and Receiver to show that the land is occupied or any portion of it mineral, the Surveyor General does not, in terms, approve the selection.

The appellees' contention is that title passed to the heirs of Baca upon the approval by the Commissioner of the General Land Office of the selection and location, and as this was not done with regard to the selection at Bosque Redondo title never passed out of the United States, and consequently under the decisions the jurisdiction of the Land Department over the application to select at Bosque Redondo continued,

and it was entirely within the power of the Commissioner to permit, as he did (Rec., p. 46), the withdrawal of that application and the selection of land elsewhere.

Location of 1866.

A point is made by the appellants that the selection and location of 1863 was attempted to be changed by the plaintiffs April 30, 1866, when John S. Watts made an application, which was allowed by Commissioner Edmunds, to correct what was alleged to be a mistake in the initial point of the location, and that from that time until July 25, 1899, the heirs of Baca and their representatives were claiming the location of 1866 (Rec., pp. 50–72; brief, pp. 11, 39).

In this connection the Court of Appeals said (Rec., p. 351);

> "We do not think the efforts to change the location in question affect the situation here. The department itself has repeatedly ruled that all those efforts were abortive, and hence that the claimants must be remitted to this location."

It is to be observed in the first place that the permission of Commissioner Edmunds to Judge WATTS to correct what was alleged to be a mistake in the description of the selection and location of 1863 assumed that the location of 1863 had ripened into a definite, final, grant to the heirs of Baca; and this is corroborated by the holding of Secretary Hitchcock of July 25, 1899 (29 L. D., 44), that Commissioner Edmunds had no authority to allow a complete change of location when it was found that instead of being a mere mistake of description the application of 1866 was really a re-location.

The holding of Secretary Hitchcock is in accord with the rule established by the Courts, that one officer of the Land Office is not competent to cancel or annul the act of his predecessor or to recall a decision devesting title (*Noble v. Union*

River Logging R. R. Co., 147 U. S., 165 ; *United States v. Stone*, 2 Wall., 525, 535 ; *Peyton v. Desmond*, 129 F., 9 ; *Macfarlond v. P. B. & W. R. R. Co.*, 37 Wash. L. R., 129).

Here, from the time of the allowance by the Commissioner of the General Land Office, May 21, 1866 (Rec., pp. 52, 53, 165) both the Land Office and the claimants believed, and acted upon the belief, that the Land Office had the right to make the order of May 21, 1866, and all the acts on the part of the claimants and on the part of the Land Department related to the location of 1866 ; but the appellees and their predecessors in title cannot be held to be guilty of *laches* with regard to the location of 1863 under such circumstances, nor since the United States has not disposed of the land included in the location of 1863 to others, except possibly as to a very small portion (Rec., pp. 89, 90), can the United States be heard to say that the rights of other persons as against the appellees have accrued to the 1863 location in the interval between 1866 and 1899.

Any impression derived from statements in the various applications to relocate the land, that the claimants at different times have admitted the lands embraced in the selection of 1863 to be mineral is erroneous, because such admissions in every case referred to the lands embraced in the alleged amended location of 1866 (Rec., pp. 56, 59, 64) ; and the statement of the Surveyor General (Rec., pp. 71, 206) was in answer to the application of Cameron to survey the 1866 location. Even if the various communications did not in themselves bear evidence of this fact, it would necessarily follow from the fact that during the period when these various admissions were made the lands which the claimants and the Land Department were referring to was the location of 1866.

There is no admission anywhere, nor is there anything in the record until the Surveyor General's report (Rec., pp. 91, 255), claiming to show that the land was occupied and mineral. When Secretary Hitchcock on July 25, 1899 (29 L. D., 34), re-

manded the then claimants to the 1863 location it resulted, as a necessary consequence, that all the acts of the Land Department, commencing with the act of the Commissioner May 21, 1866, were without jurisdiction and void.

Surveyor General's report.

With regard to the Surveyor General's report (Rec., pp. 91, 255) appellees objected to its admission on the ground that it was, so far as references to the character and condition of the land were concerned, without authority and jurisdiction and void, and that neither it, nor any of the affidavits, copies of which purport to be contained therein, was evidence of any of the facts stated.

It is understood that the said report and the copies of the affidavits therein contained were not offered in evidence to prove the facts therein stated, but merely to show that there was a question before the Land Office which required decision, and consequently the jurisdiction of the Court had not yet attached and the Court could not interfere with the Secretary in making a decision upon the question presented.

This may be admitted, but the appellees' contention is that the United States having been devested of title by the act of the Commissioner of the General Land Office April 9, 1864, neither the Secretary nor any official of the Land Department had any jurisdiction in 1905 to raise any question or to pass upon it in connection with this land.

Tumacacori and other private land claims.

The appellants contend (Rec., pp. 39, 72–74; brief, pp. 57–61) that at the time of the selection and location of 1863 a portion of the land sought to be selected and located was covered by the private land claims known as the Tumacacori and Calabasas grants and the San Jose de Sonoita grant; and that by the act of July 22, 1854 (10 Stat. 308) they were reserved from location and settlement, and consequently were not open to the heirs of Baca to select or locate.

The appellees contend that there was no reservation in the treaty, but that the reservation was purely statutory (*Lockhart v. Johnson*, 181 U. S., 516, 522), and that the reservation did not attach until the petition was filed with the Surveyor General (Rec., pp. 305, 351; *Botiller v. Dominguez*, 130 U. S., 247; *Lockhart v. Johnson*, 16 L. D., 408, 420; s. c. 181 U. S., 516; *Astiazaran v. Santa Rita Mining Co.*, 148 U. S., 80, 84), and that such was the contemporaneous construction of the statute by the Department of the Interior (Instructions August 25, 1854; Rec., p. 2), which construction is entitled to great weight with the Courts (*United States v. Moore*, 95 U. S., 763), and that the statute itself provided for instructions to be given by the Secretary of the Interior, and when given such instructions became a part of the statute and were not repealed until March 3, 1891 (*Stoneroad v. Stoneroad*, 158 U. S., 294; *Bishop of Nesqually v. Gibbon*, 158 U. S., 167; *Wilcox v. Jackson*, 13 Pet., 498; *Wolsey v. Chapman*, 101 U. S., 769; 26 Stat., 854; *Lockhart v. Johnson*, *supra*).

The construction contended for by the appellees is further sustained by the definition of the word "claim," which is: "In a just, judicial sense a demand of some matter of right, made by one person upon another, to do or to forebear to do some act or thing as a matter of duty" (*Prigg v. Pennsylvania*, 16 Pet., 615; "The assertion, demand or challenge as a right, or the thing that it demanded or challenged" (*Fordyce v. Goodman*, 20 Ohio St., 14); "Something asked for or demanded on the one hand and not admitted or allowed on the other" (*Dowd v. Cardwell*, 4 Sawy., 239). See, also, 4 Notes on U. S. Reports, 210.

All lands in the ceded territories not appropriated by the former Government before they were acquired by the United States were the exclusive property of the United States, to be disposed of as it deemed advantageous (*Irvine v. Marshall*, 20 How., 558, 561); the power of the United States to prescribe the mode of presenting and demanding lands claimed

and to provide for the forfeiture of claims not presented and claimed is not to be questioned (*Tameling Case*, 93 U. S., 66; *Botiller v. Dominguez*, 130 U. S., 247; *Ainsa v. United States*, 161 U. S., 222; *Barker v. Harvey*, 181 U. S., 490), and the United States might have forfeited such claims by prescribing a limitation as to the presentation (*Botiller v. Dominguez, supra*), or by directing the possession and appropriation of the land (*United States v. Repentigny*, 72 U. S., 217-268).

The rights of the appellees were initiated under the law and decisions holding that the reservation of these grants related to the time of the filing of the petition with the Surveyor General and could not be affected by subsequent rules, decisions or practice adopted by the Land Department (*Germania Iron Co. v. James*, 107 F., 597; *Cornelius v. Kessell*, 128 U. S., 461).

Any attempt by the Department to change the rules became a judicial question, and would be an attempt to deprive the representatives of Baca of their property without due process of law (*Noble v. Union River Logging R. R. Co.*, 147 U. S., 165; *Burfenning v. Chicago Ry. Co.*, 163 U. S., 323), and in such case it is the duty of the Courts to overrule the Land Department if it departs from the law (*Irvine v. Marshall*, 20 How., 558-567; *Temple's Case*, 105 U. S., 97, 99).

Moreover, the attempt of the Department to hold the location of June 17, 1863, subordinate to the alleged grants is an attempt to read into the act of June 21, 1860, the words "or reserved," which is in violation of the rule that nothing is to be added to a law and nothing taken away (*Rex v. Barrell*, 12 Ad. & Ell., 468; *Leavenworth v. United States*, 92 U. S., 151).

This rule was recognized and enforced by the Supreme Court of the United States in *Shaw v. Kellogg, supra*, when it is said of the attempted reservation by the Surveyor General under the direction of the Land Department (p. 343):

> "Such limitation was beyond the power of executive officers to impose."

The Tumacacori and Calabasas claims were found invalid by the United States Supreme Court (*Faxon v. United States*, 171 U. S., 244); and the San Jose de Sonoita claim was found invalid except to the extent of 1¾ *sitos*, about 7592 acres (*Ely's Admr. v. United States*, 171 U. S., 220).

If swamp lands in unceded Indian country pass and become available on removal of the Indians (*Callahan v. Ry. Co.*, 10 L. D., 285; *State of Michigan*, 8 L. D., 308; *State of Minnesota*, 27 L. D., 418), why should not land covered by the Tumacacori and Calabasas claims, and the rejected portion of the San Jose de Sonoita claim, likewise become available to the representatives of Baca, assuming that they were reserved June 17, 1863, upon their having been found by the Courts to be invalid?

It is submitted further that in using the word "vacant" in the act of June 21, 1860, the Congress intended land not appropriated by another in such a manner as to give notice of his claim to the heirs of Baca (*Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 112 F., 4 15-17; aff'd 190 U. S., 301, 312), and did not intend that the claims of Spanish or Mexican grantees, of which there was no record available, to the heirs of Baca and who were not in actual occupation of the land but merely had a written grant concealed in whatever place such grantees kept their title deeds, should prevent the selection and location of the land by the heirs of Baca.

As has been said, the United States could impose a time limit upon the presentation of the Spanish and Mexican claims to the Surveyor General, and could, if the Congress saw fit, dispose of such land subject only to a moral, possibly legal, obligation to indemnify such grantees.

The Surveyor General's report (Rec., pp. 255, 277) is unauthorized, is not evidence of the fact as to occupation or to the mineral character of the land and is not supported by any evidence.

The quotations (appellants' brief, p. 61), from *Cameron v.*

United States, 148 U. S., 301, are printed as if the second paragraph immediately followed the first, whereas the first paragraph appears on page 308, and the rest of the quotation is found on pages 310 and 311.

In that case it appears (p. 307) that a petition had been presented to the Surveyor General of the Territory of Arizona, and the Court (p. 310), after citing *Newhall v. Sanger* 92 U. S., 761, in which the claim was *sub judice*, continues quoting from that case: "Speaking of such claims, it was said by Mr. Justice DAVIS," etc.

In other words, the Cameron case and the Newhall case were both cases in which the claims were *sub judice*, and they are not, therefore, authority for the position taken by the appellants in this case.

Appellants' evidence.

The appellants introduced only documentary evidence, and this merely in support of the allegations contained in the answer, or, in other words, they have merely put in the documents to which reference was made in the answer.

Objections to admission.

Preceding each of the defendants' exhibits there is a statement of the character of the exhibit. Following that is a statement of the objection of the appellees to the admission or consideration of the exhibit, except in the case of Exhibits 11 (Rec., p. 159), 12 (Rec., p. 160), 34 (Rec., p. 208), 53 (Rec., p. 297), 54 (Rec., p. 298) and 56 (Rec., p. 299).

The appellees in addition to the special objections, make certain general objections (Rec., pp. 145, 146) to the exhibits offered by the appellants.

These general objections are (1) to all of the appellants exhibits subsequent in date to April 9, 1864, on the ground that on that date the jurisdiction of the Land Department over the land in question ceased; (2) to any of the exhibits having to do with acts of the Land Department subsequent to

April 9, 1864, upon the same ground, and (3) to the exhibits purporting to contain decisions of the Land Department which are published in the volumes of Land Decisions on the ground that the admission of such exhibits will merely encumber the record ; that the decisions may be read from the printed volumes, and that the decisions are not evidence of the facts therein stated.

The appellees insist upon all of these objections, and submit that many of them, if not all, are well founded in law.

Discrepancies in the record.

Attention has already been called to the apparent effort in the answer to lead to the belief that the appellees, or some of their predecessors in title, had admitted that portions of the 1863 location were mineral, when there is no such admission to be found anywhere in the record.

Certain photographic copies of papers in the Land Department relating to the land question, or the 1866 location, admitted by stipulation (Rec., p. 145) in the belief that since they were photographic copies they must necessarily be accurate, were found inaccurate. When the originals were presented upon the hearing, it appeared that the photographs of Exhibit 13, containing the letter from Watts to Wrightson, March 27, 1864 ; of the copy of the letters of Surveyor General of June 17, 1863 ; and of the certificates of the Register and Receiver, did not correctly show the letters, that is, with relation to the manner in which they were presented ; and that the photograph of Exhibit 12, letter of the Surveyor General of April 2, 1864, did not correctly show such exhibit, for the reason that there were certain notations upon the original letter in blue pencil, apparently made by an official in the Land Office when considering the letter, which the photograph did not show (Addition to Record in Court of Appeals).

Attached to the letter of the Secretary of the Interior to

Senator Bayard (Rec., pp. 177–179), is a tracing of a plat which is stated in the letter to be a "diagram constructed in this office showing as nearly as can be approximately the locations of June 17, 1863, and April 30, 1866."

The appellees understand that this tracing is of the map of 1884, when in 1899 the Secretary of the Interior had himself relegated the representatives of the heirs of Baca to the 1863 location, and a map of 1903 had been published by the Land Department showing the 1863 location.

Appellants' Exhibit 34 (Rec., p. 208), purporting to show the 1863 and 1866 locations, and stated to be exemplified from the official plat on file in the General Land Office, is practically identical with the diagram attached to Secretary Lamar's letter, which is stated to have been constructed in the office, and to approximately show the location of the 1863 selection. Exhibit 34 contains a certificate of the Assistant Commissioner of the General Land Office, as follows:

> "Department of the Interior
> General Land Office.
>
> I hereby certify that this is a true copy of the plat of the official survey of the land to which it relates on file in this office.
>
> (SEAL) S. W. PROUDFIT,
> Assistant Commissioner."

And yet this same tracing (Exhibit 34) contains also the same notation as is on the tracing attached to the letter to Senator Bayard, as follows:

> "Prepared to accompany the letter from the Commissioner of the General Land Office to the Honorable T. F. Bayard, U. S. S.
> "Dated May 16th, 1884."

While it is possible that after the Contzen survey was made the Department had it, so far as the location of 1863 was concerned, applied to the diagram made to accompany the

letter to Senator Bayard and found that that diagram was correct, so that the Assistant Commissioner's certificate, though apparently untrue, may correctly represent the fact; but, it is submitted, this should have been explained to the Court and the appellees not left to infer such a fact.

V.

All the equities are with the appellees.

The heirs of Baca had a valid prior claim to the land upon which the town of Las Vegas was located (Rec., p. 4). Congress confirmed both grants (Rec., p. 5). The heirs of Baca consented to waive their older title in favor of the town of Las Vegas on condition that they were given an equivalent quantity of land elsewhere within the Territory of New Mexico (Rec., p. 4). Congress accepted this waiver and made the grant under the act of June 21, 1860 (Rec., p. 5).

Had the heirs of Baca insisted upon their rights they would have been entitled to the land which was confirmed to the town of Las Vegas, even though every acre had been occupied and improved and though the land was teeming with minerals of all kinds.

In return for this right Congress gave the heirs of Baca the right to select, within the Territory of New Mexico, an equal quantity of land, vacant and not mineral, in square bodies not exceeding five in number.

In reply to what is said in appellants' brief as to the United States having received no benefit (brief, p. 54), appellees call attention to what Congress through the Senate Committee on Private Land Claims said at the time (Rec., p. 4):

> " This land has been divided out and several hundred families are located upon it.
>
> * * * Congress has other duties imposed upon

it, and is bound to legislate in such manner as to prevent, if possible, so destructive a result as the plunging of an entire settlement of families into litigation at the imminent hazard of being turned out of their homes or made to purchase a second time from a private owner the lands for which they paid their government a full equivalent in the labor, risk and exposure by which they have converted a wilderness surrounded by hostile savages into a civilized and thriving settlement, and this can be done with little loss or cost to the government.

"The claimants under the title to Baca * * * have expressed a willingness to waive their older title in favor of the settlers if allowed to enter an equivalent quantity of land elsewhere within the Territory; and and your Committee cannot doubt that Congress will accept the proposal, which, indeed, would undoubtedly have been acceded to by Mexico if the Territory had remained hers, and to whose rights and duties the United States have succeeeded."

By this act of the heirs of Baca the United States was able to protect its citizens consisting of more than two hundred families and secure them in their homes to assist in building up civilization and industry in this region and the creation of value from which the government has profited. In exchange Congress paid them in part by making the grant in question.

At that time, as said by the Supreme Court in *Shaw v. Kellogg* (p. 332):

"There were then but few persons living in New Mexico; it contained large areas of arid lands; its surface was broken by a few mountain chains and crossed by a few streams. It was within the limits of this territory, whose condition and natural resources were but slightly known, that Congress authorized this location. * * *."

(p. 334) "It is also worthy of note that Congress did not consider that there was any great probability of the discovery of mineral wealth in New Mexico. By

> the act of 1860 it confirmed various claims, amounting to millions of acres; confirmed them absolutely and without any reservation of mines then known or to be thereafter discovered within their limits. And this, although under Spanish if not under Mexican law, all minerals were perpetually reserved from such grants. * * * It made no appropriation for the exploration of the claims to be thereafter located, and although it required the completion of this location within three years, it made but meagre appropriation for surveys * * *."

Or as Mr. Justice BARNARD said (Rec., p. 308):

> "It was in the midst of the Civil War; the territory where this land was selected was inhabited by hostile Indians or subject to raids by them; the selection was made in unsurveyed lands * * *."

The selection was made Judge John S. Watts, then probably the leading citizen of the Territory and a delegate in Congress (Rec., p. 274). Judge Watts concluded his application as follows: "Said tract of land is entirely vacant, unclaimed by anyone, and is not mineral, to my knowledge" (Rec., p. 157).

The Surveyor General certified and forwarded this application to the Department, saying (Rec., p. 158): "Said location is hereby approved," thereby exercising the authority given him in the first instance to determine whether the land selected was such as was contemplated by the act.

The three years were about to expire, and had expired, when on April 9, 1864, the Commissioner of the General Land Office being satisfied, in what manner we do not know and which is immaterial to the present question, that all had been done that could be done, ordered a survey of the claim numbered 3, "as described in the enclosed application" (referring to the application of June 17, 1863), and said:

> "Transcripts of the field notes and plats, certified in accordance with the requirements of law, will be

transmitted to this office and will constitute the muniments of title, the law not requiring the issue of patents on these claims" (Rec., pp. 299, 300).

It will be observed that the Commissioner directs the survey of the claim as described in the application, that is, the running of the outboundaries. All had now been done that was contemplated either by the act or by the regulations issued by the Department, except the mere defining of the outboundaries of the tract in order to segregate it from the public domain. The title therefore passed, as was held with regard to Float No. 4 in *Shaw v. Kellogg*, *supra*, and as Mr. Justice BARNARD and the Court of Appeals held in this case.

The contention of the appellants that the acceptance, approval and filing of a survey, whereby a Surveyor General made location of the lands and reported them as vacant and nonmineral at the date of selection, was necessary to the passing of title, entirely overlooks the fact that the action of the Surveyor General and of the Receiver and Register required by the regulations was a condition precedent to action by the Commissioner in ordering a survey.

Notwithstanding the rights and equities obtained by the claimants from the foregoing facts, the Commissioner in his letter ordering the survey required the claimant to pay the costs, though there was no such provision in the act of June 21, 1860, and the act of June 2, 1862, providing for such payment, applied to claims under grants from foreign governments and not to claims such as this under an act of Congress. This error was continued and is continued in the position taken by the appellants.

What do the appellants oppose to the foregoing? A suggestion based upon "old men's tales and childish fables" that the land was occupied and well known to be mineral at the time of the selection, and that a man of Judge Watt's character and standing in the community deliberately committed a fraud when he stated that the land was "entirely

vacant, unclaimed by anyone, and is not mineral, to my knowledge."

And in their brief appellants dare to charge that under different circumstances it might have been pleaded in defense "that a great fraud had been perpetrated, and that the purpose of the suit was only to effectuate and perpetrate that fraud" (brief, pp. 21, 22).

The remedy is still open if there was any such fraud (*Noble v. Union River Logging Railroad Co.*, 147 U. S., 165, 176). But this is not the tribunal and this is not the case in which to raise the question. The charge is also too preposterous to be considered. Moreover, there is no evidence in the case to support even the suggestion of fraud or that the land was not vacant and non-mineral.

The appellants seek further to deprive the representatives of the heirs of Baca of their rights on the ground that because at the time of the selection there were certain invalid, and partially invalid, Mexican grants to a portion of the land of which no one knew, the lands were, so far as covered by such grants, not vacant. To make such a claim is to impute, as the Supreme Court said is *Shaw v. Kellogg*, *supra*, "bad faith to the Congress of the United States in making the grant." If it be necessary to sustain the grant, the act of July 22, 1854, must be held to have been repealed *pro tanto* by the act of June 21, 1860.

Failing in all their efforts, the appellants are reduced to the flimsy contention that the appellees did not show a sufficient title to maintain this suit. The defendants make no claim to any shadow of title and no one is here who makes any claim to in any wise or to any extent represent the heirs of Baca, except the plaintiffs. Under such circumstances the cases cited as to the force and effect as evidence of ancient deeds should be given the fullest weight here.

To sum up: In *Show v. Kellogg*, 170 U. S., 312, one of these floats was in question, and the circumstances were very

similar to the case at bar; the Court there held that the title passed upon the approval by the Commissioner of the General Land Office. That case is controlling in this. There has nothing been presented which would change the decision herein, which was to the same effect, or to show that the decree appealed from is in any respect erroneous.

An attempt is apparently made to give the impression that the United States had disposed of some of these lands to other persons; but there is no evidence that any, or if any but a small portion (Rec., pp. 89, 90), had been so disposed of, and it is understood that such portion as has been disposed of is within the allowed portion of the Sonoita grant.

As showing that rights of others have accrued, the defendants attached to their answer, as Exhibit A, a list of certain proposed entries (Rec., p. 85). On examination of this list it appears that the entries appearing on pages 1, 2, 3 and down to the middle of 4 of said Exhibit, are suspended because of this Baca Float No. 3; that the other entries upon page 4 of Exhibit A are mining entries, suspended for the same reason, and that only the entries on page 5 and three entries on page 6 of said Exhibit have been patented.

In the letter of the Commissioner to Senator Bayard (Rec., p. 179) it is stated that:

> "It does not appear from the record that any lands have been patented within the limits of the Location of June 17, 1863, as shown upon the diagram"

thereto attached, and which was put in as a certified copy of the plat of official survey as defendants' Exhibit No. 34.

That letter to Senator Bayard does suggest that some of the mining claims may be within the location, but, as stated, it does not appear that any of the mining entries have gone to patent.

VI.

The appellees respectfully submit that the decree appealed from should be affirmed.

Dated April 2, 1914.

JOSEPH W. BAILEY,
HERBERT NOBLE,
Of Counsel.

APPENDIX A.

Analysis of the Bill of Complaint, with Notations on the Margin of the Averments in the Answer with regard to the Paragraphs of the Complaint.

Complaint. The Bill of Complaint alleges, after the formal allegations as to the citizenship and residence of the plaintiffs and defendants and the official character of the defendants:

Admitted. 1. That the Republic of Mexico ceded to the United States by the Treaty of Gaudalupe Hidalgo in 1848 the land involved (Complaint, paragraph 2);

Admitted. 2. That by the Act of Congress of July 22, 1854 it was provided that the Surveyor General of New Mexico should ascertain and report to Congress all claims within the ceded territory under the laws of Spain and Mexico (*Id.*, 3);

Admitted. 3. That pursuant to said Act, on August 25, 1854 the Secretary of the Interior issued to said Surveyor General certain rules and regulations as to the examination and report with reference to such claims (*Id.*, 4);

Admitted. 4. That pursuant to said Act of Congress and said rules and regulations, said Surveyor General on January 18, 1855 duly gave notice to all grant claimants (*Id.*, 5);

Admitted. 5. That Section 8 of said Act of Congress provided that the report of the Surveyor General upon such claims should be laid before Congress, and until the "final action on such claims all lands covered thereby

shall be reserved from sale or other disposal by the government " (*Id.*, 6);

6. That by the Act of August 4, 1854, the provisions of the Act of July 22, 1854, were extended to the territory acquired by the Gadsden Treaty, and that by the Act of July 15, 1870, the Surveyor General of Arizona was given all the power and authority previously exercised by the Surveyor General of New Mexico (*Id.*, 7); Admitted.

7. That under the Act of July 22, 1854, the heirs of Baca on August 31, 1859, by John S. Watts their attorney, presented to the Surveyor General of New Mexico their claim to a Mexican land grant called " Las Vegas Grandes," and petitioned for the confirmation of the same; that at about the same time the Town of Las Vegas filed its petition for the confirmation to it of a grant of the same land, and thereupon said Surveyor General on December 18, 1858, reported to Congress that both claims appeared to be valid claims, and he left it to Congress to decide to which the land should be awarded (*Id.*, 8); Admitted.

8. That on May 19, 1860, the Senate Committee on Private Land Claims reported that the heirs of Baca were willing to waive their older claim in favor of the Town of Las Vegas, if allowed to enter an equivalent quantity of land elsewhere in the Territory (*Id.*, 9); Admitted.

9. That thereupon, June 21, 1860, Congress confirmed the Report of the Surveyor General as to the validity of the claims and provided (Sec. 6): " That " it shall be lawful for the heirs of Luis Maria Baca, " who make claim to the same tract of land as is " claimed by the Town of Las Vegas, to select instead " of the land claimed by them, an equal quantity of " *vacant land, not mineral*, in the Territory of New " Mexico, to be located by them in square bodies not Admitted.

" exceeding five in number ; and it shall be the duty " of the Surveyor General of New Mexico to make " survey and location of the land so selected by the " said heirs of Baca when thereunto required by them, " provided, however, that the right hereby granted " shall continue in force for three years from the " passage of this act, and no longer " (*Id.*, 10) ;

Admitted. 10. That pursuant to said act of June 21, 1860, the Commissioner of the General Land Office on July 26, 1860 instructed the Surveyor General of New Mexico to survey the Las Vegas town claim and furnish the Baca heirs with a certificate as to the quantity of land shown by such survey, and that should the Baca heirs " select in square bodies " according to the existing line of the surveys, the " matter may be properly disposed of by their appli- " cation duly endorsed and signed with your certificate " designating the parts selected by legal divisions or " sub-divisions, and so selected as to form five sepa- " rate bodies in square form. Then the certificate thus " endorsed is to be noted on the records of the Reg- " ister and Receiver of Santa Fe and sent on here by " those officers for approval. Should the Baca claim- " ants select outside of the existing surveys, they must " give such distinct descriptions and connection with " natural objects in their applications to be filed in " your office, as will enable the Deputy Surveyor when " he may reach the vicinity of such selections on the " regular progress of the surveys, to have the selec- " tions adjusted as near as may be to the lines of the " public surveys, which may hereafter be established " in the region of those selections."

" In either case the final conditions of the certificate " to this office, must be accompanied by a statement

" from yourself and Register and Receiver that the " land is vacant and not mineral " (*Id.* 11);

11. That on December 8, 1860, the said Surveyor General notified the legal representatives of the Baca heirs that the Las Vegas grant contained 496,446.96 acres, and that the heirs were entitled to select in not more than five square bodies an amount of land equal to said area, and that he was authorized to survey and locate the same (*Id.* 12); Admitted.

12. That on June 17, 1863, the heirs of Baca by John S. Watts their attorney, filed an application to locate Baca Float No. 3 described as follows: Admit that application was made but deny that it was duly made —say it should have been made to Surveyor General of Arizona.

" Commencing at a point 1½ miles from the base of " the Salero mountain in a direction north forty-five " degrees east of the highest point of said mountain, " running thence from said beginning point west " twelve miles thirty-six chains and forty-four links, " thence south twelve miles thirty-six chains and " forty-four links, thence east twelve miles " thirty-six chains and forty-four links, thence " north twelve miles thirty-six chains and forty-four " links to the place of beginning, the same being sit- " uate in that portion of New Mexico now included by " act of Congress approved February 24, 1863, in the " Territory of Arizona, said tract of land is entirely " vacant, unclaimed by anyone, and is not mineral to " my knowledge " (*Id.*, 13);

13. That on the same day, June 17, 1863, said Surveyor General certified said application, concluding " said location is hereby approved " (*Id.*, 14); Admitted but authority of Surveyor General denied.

14. That on June 18, 1863 said Surveyor General forwarded said application and approval to the Commissioner of the General Land Office with a letter in which he stated: " As this location is far beyond any " of the public surveys, I have not deemed it necessary Admitted but authority of Surveyor General denied.

" to procure any certificate from the Register and Re-
" ceiver of the Land Office, as from the nature of the
" case, they cannot officially know anything concern-
" ing it " (*Id.*, 14);

Admitted. 15. That on July 18, 1863, the Commissioner of the General Land Office wrote said Surveyor General, acknowledging receipt of the letter of June 18, 1863, and stated:

" Your approval of the location under consideration
" is found to have ignored the imperative condition
" that the lands selected at the base of Salero Moun-
" tain now included by act of Congress approved Feb-
" ruary 24, 1863, in the Territory of Arizona, is *vacant*
" *land* and *not mineral.* Before the application of
" location No. 3, of the heirs aforesaid can be approved
" by this office, it is necessary that our instructions of
" the 26th July, 1860, should be compiled with by
" furnishing a statement from yourself and Register
" that the land thus selected and embracing one-fifth
" of the claim or $99.289\frac{33}{100}$ acres is vacant and not
" mineral " (*Id.*, 15);

Admitted. 16. That April 2, 1864, the said Surveyor General wrote the Commissioner of the General Land Office, acknowledging the receipt of the letter of July 18, 1863, and stating: " That there is no evidence in the office
" of the Surveyor General of New Mexico that the
" tract of land located by the heirs of Luis Maria Ca-
" beza de Baca, designated as location No. 3, contains
" any mineral, or that it is occupied. There have been
" no public surveys made in the neighborhood of said
" tract, and there is no record of or concerning the
" land in question in the Surveyor General's office, nor,
" as I believe, in the office of the Register or Receiver
" of the Land Office of New Mexico.

" As I am personally unacquainted with that region " of the country, I cannot certify that the land in ques- " tion is ' vacant and not mineral ' or otherwise. Those " facts can only be determined by actual examination " and survey " (*Id.* 15);

17. That on March 25, 1864 the Register and Receiver certified that so far as the records of their office showed, the land not having been surveyed, it was vacant and not mineral (*Id.* 15);

Admitted but aver that Certificates of the Register and Receiver were not received by the Commissioner until after April 9.

18. That on April 9, 1864 the Commissioner of the General Land Office instructed the then Surveyor General of Arizona, who had superseded the Surveyor General of New Mexico as to jurisdiction of these lands, as follows:

Admitted but aver the action was not based upon any finding as to the character of the land nor was it induced by Certificates of Register and Receiver.

" SIR:

By an examination of the papers herewith inclosed relating to the 3d of the series of the Luis Maria Baca grants confirmed by the 6th Section of an Act of Congress approved June 21, 1860 you will perceive that the location of the one-fifth part of said grant as set forth by the claimants has been approved by the Surveyor General of New Mexico, under whose jurisdiction the application properly came at the date of the approval.

The law of 1860 referred to provides that in lieu * * the ' Las Vegas ' claim the heirs of Baca may select an equal quantity ($496{,}446\frac{99}{100}$ acres) of vacant land not mineral ' to be located by them in square bodies, not exceeding five in number,' and makes it the duty of the Surveyor General ' to make survey and location of the lands, so selected ' when required by said heirs. The act of June 2d 1862 requires all such grants to be surveyed at the expense of the claimants. In order to avaid delay you are hereby authorized whenever said claimants shall pay or secure to be paid to you a sum sufficient to liquidate all the ex-

penses incident thereto, office work included, to contract with a competent Deputy Surveyor and have the claim numbered 3 of the series surveyed as described in the inclosed application. Transcripts of the field notes and plats certified in accordance with the requirements of the law will be transmitted to this office and will constitute the muniments of title, the law not requiring the issue of Patents on these claims.

In your instructions to the Deputy Surveyor you will direct as follows: At the beginning point which will be at the North east corner of the claim a stone must be firmly planted in the earth, leaving not less than eighteen inches projecting above the surface of the ground. Upon the west face of this stone the following inscription will be durably cut, to wit—

{N. E. Cor. / Baca / CL. No. 3}

at the distance of each mile on the boundary line, from the beginning point a stone must be set or a post and mound erected, and said posts or stones numbered consecutively from the beginning point. At each of the other three corner stones must be securely planted and durably marked respectively as follows,

{N. W. cor.} {S. W. cor.} {S. E. cor.}

The affidavits of the Deputy attached to the field notes must set forth that the corners have been perpetuated and marked in accordance with the above directions.

Very respectfully, &c.,

J. M. EDMUNDS, Comr.

(*Id.*, 16);

19. That no survey, however, was made of said land until that made by Philip Contzen under contract No. 136, dated June 17, 1905, which was on November 23, 1906, endorsed as follows: Admit but aver survey was made in ordinary course of administration of Land Office.

> " This plat of Baca Float No. 3, private land
> " claim, situated in Santa Cruz County in the
> " Territory of Arizona, is strictly conformable to
> " the field notes of survey thereof executed from
> " November 3 to December 23, 1905, by Philip
> " Contzen, Deputy Surveyor, under his contract
> " No. 136, dated June 17, 1905, which have been
> " examined, approved and filed in his office.
> " U. S. Surveyor General's Office
> " Phoenix, Arizona, November 23, 1906.
> " FRANK S. INGALLS,
> " U. S. Surv. Gen'l " ;

and which plat and survey have been examined and found correct by the Commissioner of the General Land Office (*Id.*, 18);

20. That on June 17, 1905 the Commissioner of the General Land Office, without authority of law, instructed the Surveyor General of Arizona to examine the character of the land covered by the location and by any private grants at the time of such location (*Id.*, 19); Admitted except that it was without authority of law which is denied.

21. That in December 1906 the said Surveyor General forwarded the plat and survey hereinbefore mentioned to the Commissioner of the General Land Office with a report accompanied by the information which he claimed to have gathered and a recommendation that the location as a whole be rejected (*Id.*, 19); Admitted.

22. That the Commissioner of the General Land Office approved the report of said Surveyor General and his finding that the location as a whole should be rejected unless the grant claimants should within a Admitted.

fixed time disprove the allegations of fact contained in such report, which action of the Commissioner was on appeal affirmed by the Secretary of the Interior, and a motion to review such affirmance denied (*Id.*, 20, 21, 22);

Avers conclusion of law not requiring answer and that suit involves trial of title to land and is not within Court's jurisdiction.

23. That by the acts hereinbefore recited, to and including the decision and order of the Commissioner of the General Land Office of April 9, 1864, the title to the lands covered by the location of Baca Float No. 3 vested in fee in the heirs of said Baca, and the Land Department and the officials thereof thereupon ceased to have jurisdiction thereof, and all acts and decisions of such officials thereafter, except the making of said survey, were invalid and unauthorized by law (*Id.*, 23);

Admitted.

24. That on February 2, 1899, Henry Ohm applied to make homestead entry upon certain land within the limits of said location (*Id.*, 25);

Admitted.

25. That on May 14, 1908, the Register and Receiver of the proper Land Office forwarded said application to the Commissioner of the General Land Office for instructions (*Id.*, 26);

Admitted.

26. That on June 15, 1908, and prior to the decision upon the motion to review the decision confirming a hearing in regard to the Surveyor General's report, instructions were issued to said Register and Receiver to allow said Ohm to proceed with the making of said proof and to issue final certificates, stating, however, that final action would not be taken by the Commissioner of the General Land Office "until the Baca Float decision had become final" (*Id.*, 27);

Admit but deny that plaintiffs were entitled to notice as entry was on Tumacacori grant.

27. That the officers of the Interior Department proceeded with regard to said homestead application without notice to the plaintiffs, or without giving them any opportunity to be heard in regard thereto (*Id.*, 28);

28. That on November 28, 1908, the fact of said homestead application became known to the plaintiffs (*Id.*, 29); Neither admitted nor denied.

29. That there are many other alleged entries upon the land within the limits of said location (*Id.*, 30); Admit but aver entries on Tumacacori Calabasas or San Jose de Sonoita grants.

30. That the execution of the instructions with regard to said homestead application of Ohm and the other entries would cast a cloud upon the title of the plaintiffs and induce others to attempt to enter said lands and cause endless litigation (*Id.*, 31); Denied.

31. That if said entries are allowed to ripen into a title in fee simple by the issue of patent, the plaintiffs would be irreparably damaged (*Id.*, 32, 36); and Denied.

32. That the plaintiffs have succeeded to the title of the Baca heirs by mesne conveyances (*Id.*, 33). Require proof.

APPENDIX B.

Analysis of the grounds of the defendants' Demurrer.

The defendants demurred to the bill, on the following grounds:

1. That the Court was without jurisdiction, because the real purpose of the suit was to try title to real estate in Arizona;

2. Because the plaintiffs have an adequate remedy at law in that they could compel the defendants by mandamus to receive and record the plat and survey and the field notes thereof;

3. Because if the title did not vest in the plaintiffs' predecessors in title by the action of the Commissioner

of the General Land Office on April 9, 1864, the legal title is still in the United States, which has not consented to be sued ;

4. Because the Court cannot grant the prayers of the bill without deciding whether the title passed April 9, 1864, or is still in the United States, so that the United States is an indispensable party, and the United States has not consented to be sued ;

5. Because the acts complained of are exclusively within the jurisdiction of the Interior Department, are judicial and not ministerial in character, and are not subject to the control of the Court ;

6. Because there are divers other persons necessary parties to the bill who are not made parties ;

7. Because the Court is without jurisdiction to grant that portion of the third prayer to expunge from the plat of survey the lines showing the segregation of the San Jose de Sonoita claim, because the claimants thereto are necessary parties to this action ;

8. Because the citizens of Tubac Township are not made parties ;

9. Because there has never been an adjudication by the officials of the Land Department that the lands involved were on June 17, 1863, vacant and not mineral ;

10. Because the plaintiffs are not entitled to the relief prayed for ;

11. Because the bill is in other respects uncertain, informal and insufficient, and does not state facts sufficient to entitle claimants to any relief.

APPENDIX C.

Abstract of Decision upon the Demurrer.

The foregoing demurrer was argued at length before Mr. Justice BARNARD, and both sides filed elaborate briefs. Judge BARNARD gave the matter careful and deliberate consideration.

His decision should be read in its entirety, as it is very illuminating upon the law of the case, and for the purposes of this hearing *is* the law of the case.

The Judge refers to the case of *Shaw v. Kellogg*, 170 U. S., 312, as having approved the general legislation with reference to the grant, and quotes Mr. Justice BREWER'S closing opinion, in which he held that the Act of 1860 cast upon the Surveyor General of New Mexico the primary duty of deciding whether the land selected was such as the grantees might select, that that officer approved the selection, and that the Land Department had first suspended action and finally directed the Surveyor General to close the matter and notified the parties through him that the field notes survey and plat, together with the act of Congress, would constitute the evidence of their title.

Justice BARNARD pointed out that the heirs of Baca were not obliged to select their ground where surveys had been made ; that necessarily a tract of 99,289.39 acres, which as a whole was to be non-mineral and where no provision was made for indemnity lands, would include a portion of the land that might be mineral ; that the selection was required to be within the limits of the Territory of New Mexico, then practically unknown, and the heirs were limited to three years within which to make the selection.

Judge BARNARD further points out that in the Shaw-Kellogg case the certificates of the Surveyor General and of the Register and Receiver stated that they were satisfied the land was vacant and non-mineral, such certificate being made from good and sufficient evidence but not upon personal knowledge or official records; and that in the present case the Surveyor General approved the selection, and both he and the Register and Receiver stated that there was no evidence, so far as either of them knew, that the land was mineral or occupied, the Register adding that from all information in his office the same was vacant and non-mineral, and the Surveyor General stating that having no personal knowledge on the subject, and the surveys not having reached that territory, he could not state whether the land was vacant or mineral or not.

Judge BARNARD concludes as follows:

> "On receipt of these three certificates, the Commissioner seems to have approved of the location, for on April 9, 1864, he gave directions for the tract to be surveyed, which was the only thing necessary to segregate it from public land, the selection having been approved by the Surveyor General, and the purpose of the survey being to perfect title under the authority of the act approved June 21, 1860.
>
> "Being of the opinion that the title to this tract vested in the heirs of said Baca when the location was approved, and the survey ordered, I think the complainants may maintain their bill for some portion, at least, of the substantial relief for which they pray; and the demurrer, being to the whole bill, must be overruled.
>
> "This conclusion as to title, if correct, will enable the suit to be maintained, notwithstanding the objection made as to want of other parties defendant. Title being out of the United States,

it has no interest and is not a necessary party, and the Land Department can not rightfully treat the tract as open to public entry, and the officers may therefore be enjoined."

An order was thereupon made, overruling the demurrer and allowing the defendants sixty days to file and serve an answer, which was done.

APPENDIX D.

Analysis of the Defendants' Answer.

The defendants filed an elaborate answer, but in it they do not controvert the facts set out in the bill of complaint, except that they do not admit the alleged citizenship and residence of the plaintiffs; that they deny the application was properly made June 17, 1863, to the Surveyor General of New Mexico, a Surveyor General having then been appointed for the Territory of Arizona, who, however, did not reach his post of duty, or open his office, until the following January; that they deny that the certificates of the Register and Receiver as to the character of the land were before the Commissioner at the time he made the order of April 9, 1864, and that they deny that the plaintiffs have succeeded to the title of the Baca heirs by mesne conveyances.

The answer sets up as an affirmative defense:

1. That the United States has never conceded that the title to the land involved vested in the Baca heirs, or that the order of the Commissioner of the General Land Office of April 9, 1864 vested title in said heirs; that the United States has at all times been in possession of

said land; that the Baca heirs have never been in such possession, and have never attempted to take possession, or to exercise or discharge the rights or duties of ownership thereover, either by the assessment or payment of taxes thereon or otherwise; that said Baca heirs, until 1899, were attempting to secure a survey and passing of title to another and different tract of land;

2. That on October 30, 1862, said heirs by John S. Watts selected as one of the five locations "a place called and known as the Bosque Redondo, on the River Pecos, the center of said location to be a point on the northeast bank of the River Pecos, five miles below the mouth of the canyon forming the valley of said River Pecos, the location being so surveyed as to form a square on that center, with the lines running east and west, north and south the distance required to form the area of said location";

3. That on October 31, 1862, the Surveyor General of New Mexico certified the said application and stated that he believed the land described to be vacant and not mineral, and accompanied his certificate with the Certificate of the Register and Receiver dated November 8, 1862, certifying that there was nothing on record in their office to show that the land was occupied or any portion of it was mineral, and on November 8, 1862, the Surveyor General transmitted said application to the Commissioner of the General Land Office, stating that it was proposed to establish a military post at the Bosque Redondo, but whether it would fall within the limits of the location or not he did not then know;

4. That on January 18, 1863, Watts, as attorney for the Baca heirs, applied for leave to withdraw the fore-

going location, which application was granted February 5, 1863;

5. That by act of February 24, 1863, the Territory of Arizona, within which the land involved lies, was established and provision made for a Surveyor General who was given the same powers as the Surveyor General of New Mexico had previously had;

6. That on May 6, 1863, the office of Surveyor General for Arizona was established, to which office Levi Bashford was appointed and confirmed on May 27, 1863, who took the oath of office and executed the bond required June 2, 1863, and who arrived and opened his office at Tuscon, Arizona, January 25, 1864;

7. That the letter of the Surveyor General of New Mexico to the Commissioner of the General Land Office of April 2, 1864, was received at the said Land Office April 4, 1864, and that the certificates of the Register and Receiver, dated March 25, 1864, were inclosed in a letter from Mr. Watts to Mr. Wrightson dated March 24, 1864, and were not received by the Commissioner of the General Land Office until May 26, 1864;

8. That on April 30, 1866, John S. Watts sought to locate said Float as follows:

> "to commence at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north 12 miles 36 chains and 44 links, thence east 12 miles 36 chains and 44 links, thence south 12 miles 36 chains and 44 links, thence west 12 miles 36 chains and 44 links to the place of beginning."

which was practically allowed by the Commissioner of the General Land Office in his instructions of May 21, 1866, to the Surveyor General saying that

the original instructions had been returned by Watts, and directing the survey in accordance with the amended description, which survey was not made because of the failure to deposit the amount required to cover the costs ($900.);

9. That on August 15, 1877, J. H. Watts applied for permission to re-locate the float, stating "We now suppose this location to be on mineral lands," which was denied on the ground that the limitation of three years had expired;

10. That on October 10, 1877, Charles D. Posten made a further application to re-locate said float, on the ground that subsequent to said location minerals had been discovered and that prospectors were on the ground;

11. That said Posten was in 1857 and thereafter operating certain mining properties within the area covered by the '63 location and also within the boundaries of the amended '66 location, and in 1858, or thereabouts, said Posten sold an interest in said mining claims to Wrightson & Co., the Wrightson being the same person to whom Watts addressed the letter of March 27, and to whom he referred in his letter of April 30, 1866, and as early as 1865, and at the date of the letter of October 10, 1877, said Posten was an agent of the Baca heirs and of John S. Watts, their assignee;

12. That in 1882 John C. Robinson, as successor in title to the Baca heirs, memoralized Congress to permit him to take in lieu of said location public land scrip to the extent of the acreage involved, to be located upon any vacant, non-mineral public land in New Mexico, Arizona, or elsewhere, which leave was refused, both of the bills introduced in pursuance of said memorial, however, reciting that

the "one-fifth of the grant of land" in lieu of which said scrip was to be issued "has not yet been located"; and upon failure of passage of said bills Robinson, on February 13, 1885, applied to the Commissioner of General Land Office for leave to re-locate said grant, as to which application the Commissioner of the General Land Office, on March 12, 1885, issued instructions permitting Robinson to re-select in the name of the heirs of Baca land in any part of the Territory of New Mexico as constituted at the date of the grant, which lease was on July 13, 1886, revoked, Commissioner Sparks holding that he had no power to permit a re-location, which decision was upheld by Secretary Lamar on June 15, 1887, in an opinion in which he held that the claimants must be held to the location of June 17, 1863; and thereafter Robinson requested that a survey be ordered and stated that a deposit would be made to cover the costs, and on March 5, 1889 the Surveyor General of Arizona was directed to order a hearing to determine the known character of the land as of the date of selection prior to the making of the survey of the out-boundaries, unless in the course of such hearing a survey was necessary, the decision ruling that "In these cases the title passes upon the approval of the survey of the claim by the surveyor-general." Robinson appealed from this order, and the Secretary affirmed it and overruled a motion to review such affirmance;

13. That on June 9, 1893, John W. Cameron made a formal demand for the survey of the 1866 location, which demand on June 17, 1893, was denied by the Surveyor General, who stated as his reason that he personally knew the land to be mineral, and that it would have so appeared to the original claimants if they had acted in good faith;

14. That the defendants aver that from April 30, 1866, to July 25, 1899, the land claimed by the representatives of the heirs of Baca was that embraced in the 1866 location, and no claim whatsoever was made during that time to the lands covered by the 1863 location; that the alleged amendment was a real and substantial re-location;

15. That May 6, 1899, the Commissioner of the General Land Office transmitted to the Department an application for the survey of said amended location, and on July 25, 1899, the Department ruled that the claimants were bound by the 1863 location, vacated the prior orders as to a hearing, and directed the Surveyor General of Arizona to make the survey and to investigate and determine the character of the land as the work of the survey progressed in the field, the question of the conflict of the Tumacacori, Calabasas and San Jose de Sonoita grants then arising;

16. That defendants aver that the Tumacacori, Calabasas and San Jose de Sonoita grants were made prior to the cession by the treaty of Guadaloupe Hidalgo and the so-called Gadsden purchase and were reserved by the act of July 22, 1854; that the Supreme Court in *Faxon v. United States*, 171 U. S., 244, declared the Tumacacori and Calabasas claims void, and in *Ely's Admr. v. United States*, 171 U. S., 220, the same Court declared the San Jose de Sonoita grant void except as to one and three-fourths sitios, and on June 30, 1900, the Secretary of the Interior held that the selection of 1863 did not include any portion of said grants;

17. That the defendants aver that thereafter the plaintiffs, Vroom and John H. Watts, petitioned to be heard on the decisions of July 25, 1899, and June 30, 1900, which petition was on September 29, 1900,

allowed, and after hearing and consideration the Department on March 5, 1901, decided that the final action could not be taken until survey, investigation and determination as to the known character of the land at the time of the selection was made by the Surveyor General, and that the Tumacacori, Calabasas and San Jose de Sonoita grants were not subject to selection under the act of June 21, 1860, and the motion for rehearing and review of this decision, filed by another claimant, was denied June 1, 1901;

18. That defendants aver that the offer of claimants to pay the cost of survey not having been complied with, and a protest against paying said costs having been overruled, the Department on October 31, 1902 directed the Commissioner to notify claimants that in default of the payment of the deposit within ninety days the Land Department would proceed to adjudicate and determine any claims to lands within the exterior limits of the 1863 selection.

19. That defendants aver that claimants failed to comply with the order; that the ninety days expired March 3, 1903, and that during the time that the float had been in controversy, and particularly the 1866 amendment, many adverse claims had been initiated, particularly in that part of the 1863 selection covered by the Tumacacori, Calabasas and San Jose de Sonoita grants, a full list of said claims being attached to the answer;

20. That defendants aver that after various extensions with regard to the making of the deposit the Commissioner of the General Land Office on November 10, 1904 represented that it was necessary to have a survey in order to determine many pending cases, and recommended that for the purpose of administering the public land laws

the exterior boundaries of Baca Float No. 3 be surveyed and connections made with the other grants in conflict therewith, and on December 28, 1904, the Secretary of the Interior directed that said survey be made, said direction containing a provision that when the grant claimants applied for patent the cost of such survey must be demanded of them as a condition precedent to the issuance of the patent, and in pursuance of said direction the Contzen survey was made, and showed 8,656 acres in the Northeast portion of distinctly mineral land, alleged to have been known as such by the claimants at the time of selection, and 30,408.83 acres within the exterior lines of the float covered by the Tumacacori, Calabasas and San Jose de Sanoita grants, and 125.60 acres included within said selection of the town site of Tubac, a settled community prior and subsequent to 1860;

21. That defendants aver that said Surveyor General made an examination of the character of the land and took evidence of the known character prior to 1863, and as a result of such examination made a report to the Department on November 5, 1906, recommending the rejection of the selection in its entirety;

22. That defendants aver that on May 7, 1907, the plaintiffs were heard orally by the Commissioner of the General Land Office, briefs also being submitted, and on May 13, 1907, the General Land Office rendered its decision, calling attention to the fact that although notified by the Surveyor General, the plaintiffs had failed to submit any evidence as to the character of any portion of the tract, and ordered the Surveyor General to notify the claimants that sixty days would be allowed them to introduce evidence and in default thereof the findings of the Surveyor General would be accepted and the entire selection finally

rejected. On appeal the Secretary of the Interior on June 2, 1908, rendered an elaborate decision, affirming the order of the Commissioner, and a motion to review this last decision was denied December 5, 1908 ;

23. That defendants aver that this action was brought pending the time allowed for the hearing, and that no final action can be taken by the Department until the restraining order, entered herein, is disposed of, when the Baca claimants will have full opportunity to offer evidence tending to prove that on June 17, 1863, the tract claimed was, or any part or parts thereof were, vacant and non-mineral, and title to any portion found to be vacant and not known to have been mineral will be vested in the Baca claimants ;

24. That the defendants aver that the legal title is still in the United States, and the matter therefore within the exclusive jurisdiction of the Department of the Interior ;

25. That the United States is a necessary party hereto, and has not consented to be sued ;

26. That the defendants say that the information contained in the documents and official papers set out in the answer indicate fraud on the part of the locators, and unless it should be determined on a hearing that the tract, or portion thereof, was vacant and not known to be mineral at the time the selection was made, it would be the duty of the defendants to reject the claim, and that even had proceedings been had at the time whereby the legal title vested in the Baca heirs, the United States would not be barred from raising the question of fraud and procuring the cancellation of said title ; and therefore the granting of the relief asked by the plaintiffs would be to adjudicate title in the Baca claimants as against

the United States without the United States being a party to the proceedings;

27. That the defendants say that this is an action to try title to real estate in Arizona; that the cause of action is legal, not equitable, and if plaintiffs have any right, it should be asserted in a court of law, and that the facts that they are not and never have been in possession, and that there are entrymen in possession, suggest a proper action at law, and that those parties who have instituted claims within said float, and especially the inhabitants of Tubac and the owners of the San Jose de Sonoita claims, are necessary parties to this bill and are not in court; and that for the reasons set forth in defendants' demurrer the plaintiffs cannot maintain this suit.

Index.

TABLE OF CASES.

United States Supreme Court

OCTOBER TERM, 1913—No. 889.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office (defendants below),

Appellants,

against

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN WATTS and JAMES W. VROOM (plaintiffs below),

Appellees.

BRIEF IN BEHALF OF THE APPELLEES, JAMES W. VROOM AND JOHN WATTS.

Statement of the Case.

This appeal has been taken by the appellants (the defendants below), from a decree of the Supreme Court of the District of Columbia (Printed Record, p. 309), unanimously affirmed by the Court of Appeals of the District, directing that the appellants file, as a muniment of the title which passed on April 9,

1864, to the heirs of Luis Maria Baca, deceased, the plat and field notes of a survey, made under the direction of the Land Department and admittedly correct (Printed Record, pp. 11 and 36), of a tract of land known as Baca Location No. 3, selected under the sixth section of the Act of Congress, approved June 21, 1860 (12 Stat., 71); the decree also enjoined the appellants from proceeding with certain homestead and mineral entries on the tract, and from proceeding in any other manner with reference to the land, except to file the field notes and plat of survey.

Appellees contend that title to the tract in question —located in Arizona (but at one time a part of New Mexico), and containing substantially 100,000 acres— passed to their predecessors in title, under an order of survey and decretal memorandum, made by the Commissioner of the General Land Office, on April 9, 1864 (Printed Record, p. 299), in an exchange of lands, acre for acre, between the United States and appellees' predecessors.

Mr. Justice Barnard wrote full and careful opinions, on overruling the demurrer to the Bill and on final hearing; and the opinion of the Court of Appeals, written by Mr. Justice Robb, ably discusses the points of law involved herein. All the facts in the case, as well as the points of law involved, are clearly set forth in these three opinions.

None of the essential facts is in dispute; the issues of fact, raised by the answer and by the evidence adduced by the appellants thereunder are comparatively trivial. All of the issues of facts were decided in favor of the appellees by both of the lower courts, and naturally their decision thereon will be accepted by this Court. (*Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U. S., 401, 412 and cases cited.)

Federal Questions Involved.

This case involves the proper construction of three Acts of Congress: the sixth section of the Act of June 21, 1860 (12 Stat., 71), the eighth and ninth sections of the Act approved July 22, 1854 (10 Stat., 308), and the entire Act of June 2, 1862 (12 Stat., 410); it also involves the nature, extent and scope of the powers and jurisdiction of the appellants (the defendants below), under each of said Acts. The appellants in their answer presented all these Federal questions for consideration by the Court below.

We concede that this appeal was properly taken to this Court and that it has jurisdiction over it.

Theory of the Bill.

The appellees (the plaintiffs below) filed their Bill, alleging that the legal title had passed on April 9, 1864, to the heirs of Luis Maria Baca, deceased, when the Commissioner of the General Land Office (Printed Record, pp. 299, 300), accepted and ratified the approval of the location by the Surveyor General of New Mexico of a specific tract of land with exact boundaries, and that thereafter the Land Department ceased to have jurisdiction over the land, its only duty being to file the field notes and plat of survey as "a muniment of title, the law not requiring a patent."

The Bill alleges that the appellants refuse to file the field notes and plat of survey, though the accuracy thereof is conceded, and that they are assuming to treat the land as public land, so as to allow homestead and mineral entries thereon. The Bill prays that the plat and field notes of survey be filed, and the defendants enjoined from creating clouds on appellees' title by proceeding with the homestead and mineral entries. That is the sole object of this action.

It is incumbent upon appellees to prove that legal title has passed from the United States, before they are entitled to the relief prayed for.

In this brief, we shall endeavor to demonstrate that the legal title has passed, and that the relief given by the Court below was proper and within its jurisdiction.

ARGUMENT.

I.

When legal title has passed from the United States, the Secretary of the Interior and Commissioner of the General Land Office may be enjoined from interfering therewith and compelled to supply a muniment thereof.

Jurisdiction.

When legal title has passed from the United States, the Courts of the District of Columbia have jurisdiction to restrain the Secretary and Commissioner from attempting to overrule or disregard a final adjudication made by a former Commissioner, and from doing or permitting acts in disregard of that title or creating a cloud upon it, even though a muniment of title has not been given, and the land is outside the District. The United States is not a necessary party to such a suit; the Courts are not divested of jurisdiction, even though the officers in question assert authority as its officers, and the plaintiff be required to prove legal title out of the United States.

Noble v. Union River Logging R. R., 147 U. S., 165.
Phila. Co. v. Stimson, 223 U. S., 605, 620, 622, 623.
Ballinger v. Frost, 216 U. S., 240.
Peyton v. Desmond, 129 Fed. 1, 8 (Opinion by Mr. Justice Van Devanter).
U. S. v. Stone, 2 Wall, 525, 535.
Garfield v. Goldsby, 211 U. S., 249, 261.
Beley v. Naphtaly, 169 U. S., 353, 365.
Board of Liquidation v. McComb, 92 U. S., 531, 541.
U. S. v. Schurz, 102 U. S., 378, 396, 402 to 404.
Allen v. B. & O. R. R. Co., 114 U. S., 311, 315.

Even though the officers allege that the United States claims legal title, the Courts still have jurisdiction, if the *admitted facts* fail to sustain the claim. Two recent cases where the defendant officers unwarrantably claimed that title was still in an Indian nation, to be administered by the United States under a trust or power in trust, uphold the jurisdiction of the Courts in such cases.

Ballinger v. Frost, 216 U. S., 240.
Garfield v. Goldsby, 211 U. S., 249.

In *Shaw v. Kellogg*, 170 U. S., 312, the United States, by special leave, filed two briefs, asserting that title was still in it; but its mere claim of title was not sufficient to prevent the Court from giving judgment in an ejectment action to a plaintiff who was out of possession, and who could not, of course, prevail except on the strength of his own title. The printed report of the case does not show the filing of the briefs, but we have copies obtained from the clerk of this Court.

In *U. S. v. Schurz*, 102 U. S., 378, *supra*, the Secretary claimed that title was in the United States until the delivery of the patent; and in the *Noble* case, 147

U. S., 165, *supra*, the Secretary contended that he had the right to revest title in the United States. In neither case was the United States deemed to be a necessary party, though the officers claimed they were acting solely in its behalf.

A claim of title in the United States, *disproved by the Court's construction of admitted facts*, is a mere conclusion of law, and must be disregarded in the same manner as a similar allegation of title in any other third party; otherwise, the Land Department could secure itself in all cases against the jurisdiction of the Courts, by a simple allegation that the United States still had or claimed legal title.

In the case at bar, no Commissioner or Secretary has ever attempted directly to revoke, annul, or even disapprove of the action herein of the Commissioner on April 9, 1864; they have simply attempted to apply their own varied construction of it. The construction of that action of April 9, 1864, and of what is necessary to pass title, are purely questions of law, involving substantive rights and not matters of administrative detail, and the courts have full jurisdiction to make and enforce their own construction thereof, even as to whether, on the admitted facts, legal title has passed.

> *Wisconsin R. R. Co. vs. Forsythe*, 159 U. S., 46, 61.
> *Calhoun v. Violet*, 173 U. S., 60, 63.
> *Menotti v. Dillon*, 167 U. S., 703, 719.
> *Sanford v. Sanford*, 139 U. S., 642, 647.
> *Hawley v. Diller*, 178 U. S., 476, 489.

A direct revocation by the Department of its action by which legal title passed is an attempt to deprive an owner of his property, without due process of law; the end desired can only be effected in a direct action by the United States to annul the grant. (*Noble v. Union River Logging R. R. Co.*, 147 U. S., 165, 176.)

The rule also applies where the attempted nullification is by indirect means, such as by rulings *over thirty years after the Commissioner's action*, that it was insufficient, *as a matter of law*, to pass title, or that, *as a matter of law*, certain lands were to be reserved from the grant.

Compelling Performance of Ministerial Duties.

The Secretary and the Commissioner may be compelled to do a ministerial act not involving discretion, such as issuing a patent or giving a muniment of title when the right thereto is vested; as such right is equivalent, so far as the Government is concerned, to a patent or muniment already issued or given.

Ballinger v. Frost, 216 U. S., 240, 250.
U. S. v. Detroit Lumber Co., 200 U. S., 321, 335.
Garfield v. Goldsby, 211 U. S., 249.
Wright v. Roseberry, 121 U. S., 488, 497, 499.
U. S. v. Stone, 2 Wall, 525, 535.
U. S. v. Schurz, 102 U. S., 378, 402 to 404.

A ministerial duty arises where an officer has no discretion as to whether or not he shall perform it, even though the officer must construe the law to find out what he must do.

Roberts v. U. S., 176 U. S., 221, 231.
Mississippi v. Johnson, 4 Wall, 475, 498.

It is well settled that even a patent, *with its words of conveyance*, is often merely the muniment or documentary evidence of a title which passed sometime previously thereto; in such cases the execution and delivery of a patent are ministerial acts, neither involving nor admitting any discretion whatsoever as to the propriety thereof.

See foregoing cases and also:

Deseret Salt Co. v. Tarpey, 142 U. S., 241, 251.
Wisconsin R. R. Co. v. Price County, 133 U. S., 496, 510.
Langdeau v. Hanes, 21 Wall, 521, 529
Whitney v. Morrow, 112 U. S., 693.
Morrow v. Whitney, 95 U. S., 551.
Simmons v. Wagner, 101 U. S., 260, 261.

A "muniment of title," such as the Commissioner on April 9, 1864, ordered the plat of survey to be (Printed Record, pp. 299, 300), is only a *means of evidence* by which an owner may defend his boundaries or title (*Wedge v. Spencer*, 7 N. Y. Supp., 172, 173).

Nothing can be more ministerial than the filing of the plat of a survey which is admittedly correct (Printed Record, pp. 11 and 36), or the making of a survey "to run the lines" of the boundaries (Printed Record, pp. 299, 300), after the Commissioner had advised the Surveyor General that the propriety of the location had been established.

Final Act.

The final act which bars the Commissioner and the Secretary from any further adjudicative jurisdiction is not the last possible act in point of time, but the adjudicative act on the merits which is intended to be conclusive thereon. An analogy is found in judicial proceedings, where the final judgment is the final act in point of conclusiveness and the return of execution is the final act in point of time. A judgment is none the less final because it directs or allows the performance of certain subsequent ministerial acts; and the determination of the Department is a final adjudication, even though it directs the marking out of the boundaries of a specific tract and the filing of a map

thereof as a muniment of title. In each of the following cases, a ministerial act remained to be done, but the non-completion of that act was held not to allow the Secretary of the Interior to reopen the proceedings:

Ballinger v. Frost, 216 U. S., 240, where a patent *as a muniment of title* remained to be issued.

U. S. v. Schurz, 102 U. S., 378, where a patent had been executed but not delivered.

Mandatory Injunction.

The equitable remedy of mandatory injunction is well known.

Ex parte Lennon, 166 U. S., 548, 556.
Parsons v. Marye, 23 Fed., 113.
Weiner v. Louisville Water Co., 130 Fed., 251, 256.

As a court of equity always seeks to do complete justice, the Courts below were, therefore, well within their power in directing the appellants to file the plat of survey as a muniment of title, in accordance with the order herein of the Commissioner on April 9, 1864 (Printed Record, pp. 299, 300).

Appellants' Cases

In the courts below, the appellants cited several decisions of this Court which are readily distinguishable from the case at bar:

Oregon v. Hitchcock, 202 U. S., 60, where the Court found that the legal title was still in the United States.

Minnesota v. Hitchcock, 185 U. S., 373, brought to divest title from the United States by enjoining a sale of land by its officers.

Louisiana v. Garfield, 211 U. S., 70, where confessedly the bill was filed to establish the title of the state to certain lands, and where there were certain questions of fact to be determined, upon which the United States was entitled to be heard.

Kirwan v. Murphy, 189 U. S., 35, where no irreparable damage was proved, and the Land Department had never decided an essential point.

U. S. ex rel. Ness v. Fisher, 223 U. S., 683, where this Court held that the Secretary's construction of a certain law in a matter of *administrative detail* was at least a possible one and could not be disturbed.

Knight v. Land Association, 142 U. S., 161, 177, where the statement in the opinion that the Secretary may at any time before the issuance of a patent overrule a previous determination must be limited to those cases in which the patent is not a mere muniment of title, but the means of passing legal title out of the United States. (See *Ballinger v. Frost*, 216 U. S., 240; *U. S. v. Schurz*, 102 U. S., 378.)

Conclusion.

In the case at bar the appellees do not complain of any *trespass* by the appellants on Arizona land, nor do they seek to try its title; and the United States is not bound by any decree herein. The courts of the district have jurisdiction, as equity acts *in personam*, and the appellants have their official residence and perform their official functions in the district. (See *Phila. Co. v. Stimson*, 223 U. S., 605, 620, 622, 623.)

An examination of the printed record (pp. 85 to 90) will show the large number of pending entries allowed by the department since its decisions in 1899 and 1901, and which the survey of 1905, first officially demonstrated to be within the grant.

II.

The appellees, John Watts and James W. Vroom, have proved sufficient title in themselves to maintain this action.

The recitals of heirship, and official certificates thereto in the acknowledgments, in the various deeds in evidence herein (Printed Record, pp. 316 to 321, 335), executed by the Baca heirs to John S. Watts (*who obtained the legislation* [Printed Record, p. 4] *and made the selection as their attorney and knew who they were*), are presumptive evidence of such heirship, as the deeds in question were made and recorded fifty years ago; and such deeds are also to be deemed genuine and entitled to the respect accorded by law to ancient deeds, *especially as there has been no inconsistent possession by any Baca heir.*

Applegate v. Lexington, 117 U. S., 255, 262 to 264.
Fulkerson v. Holmes, 117 U. S., 389.
Derry v. Cray, 5 Wall., 795, 805.
Wilson v. Snow, 228 U. S., 217.
Little v. Pallister, 4 Me., 209.
Revised Statutes of Arizona, 1901, Title 12, Sections 758 to 760.
McMahon v. McDonald, 113 S. W., 322.
Hodge v. Palm, 117 Fed., 396.
Ford v. Ford, 27 App. D. C., 401.

In the Shaw case, the same deeds were introduced in evidence by the plaintiffs therein, who claimed thereunder in an ejectment action; and, if deemed sufficient therein to warrant judgment in favor of a plaintiff out of possession, they ought to be sufficient in this case.

If only one of the grantors in the Baca deeds was in fact an heir, entitled to an undivided share, however small, in the selection, the appellees, John Watts and James W. Vroom, would have the right to maintain this action, as it is an action that any tenant in common of the legal title may maintain, because tenants in common are seized of the whole estate and not of any special part thereof.

The appellants (Printed Record, p. 57), admit that J. H. Watts was, as he asserted in his letter of August 15,1877, to the Commissioner,

> "* * * a successor by inheritance to a share in such rights in such float as the said John S. Watts possessed at the time of his decease."

The plaintiffs, John Watts and James W. Vroom, claim through deeds made by said J. H. Watts and others, as the heirs and successors by inheritance to the rights of John S. Watts; and have introduced proper deeds in evidence, duly executed by said J. H. Watts and others (Printed Record, p. 336 as corrected on p. 340). As there is a proper chain of title from the Baca heirs to John S. Watts, and to the appellees, John Watts and James W. Vroom, from said J. H. Watts ("successor by inheritance to a share in such rights" in the original location of 1863, as John S. Watts had at the time of his decease), said two appellees, as tenants in common of at least an undivided interest in the whole legal title, have the undoubted right to maintain this action.

The appellees, John Watts and James W. Vroom, did not deem it necessary (although they readily could have done so) to introduce any further evidence of their title, in view of the admissions in the answer as to the interest of J. H. Watts, an admission which, furthermore, can be construed to hold that John S.

Watts did have some estate in the location of 1863 at the time of his decease.

The appellees, Vroom and John Watts, never appeared in nor asked for any relief from the Land Department until September 4, 1900 (Printed Record, pp. 228 and 230); and then they asked only for the execution of the order of survey of April 9, 1864, and expressly denied then and at all times thereafter, that the Department retained any adjudicative jurisdiction.

Alleged Title of Appellees Davis and C. C. Watts.

The appellees, C. C. Watts, and D. C. T. Davis, Jr., claim under an instrument which is either an attempted assignment of mortgage or a power of attorney (Printed Record, p. 332), made to them "as trustees," by the surviving trustee and the heirs and legal representatives of a deceased joint trustee, named in a mortgage (Printed Record, p. 337), made by Arizona Copper Estate (of land in a civil law state) to Alex F. Mathews and S. A. M. Syme, who were in fact trustees, as will appear by the language of the mortgage; and S. A. M. Syme, the other joint trustee is still living (Printed Record, p. 334). Mathews and Syme had title to the invalid amended location of 1866 (Printed Record, pp. 325 to 332), under a chain of deeds, beginning with the assignment by John S. Watts to Christopher E. Hawley in 1870 (Printed Record, p. 332), which purported to transfer by *quit claim deed* the interest of the grantor, John S. Watts, by metes and bounds in that one of the three separate locations of Baca Float No. 3, known as the attempted amended location of 1866. If there was any right to make such amended location, it passed to John S. Watts as one of the incidents or appurtenances of the

deed of May 1, 1864, of the 1863 location; and the mere reference to that deed in the Hawley instrument as the *source of title* cannot overrule the specific description in the instrument of land in which the grantor had some interest in 1870, and which the successors in title of Hawley continued to assert to be the true location until the Secretary decided in 1899 (Printed Record, p. 209) that the attempted amended location of 1866, was void *ab initio*.

III.

History and construction of the Act of June 21, 1860.

History of the Act.

The facts regarding this grant, which are documentary, are set forth at length in the opinion of Judge Barnard in overruling demurrers filed in this case (Printed Record, p. 20).

From these documents it appears, that the government of Mexico made two grants of the same tract of land, situated in what is now the State of New Mexico, both designated "Las Vegas Grandes." The first grant was made to Luis Maria Baca and his sons, the subsequent one to the town of Las Vegas.

With regard to these grants the Surveyor General in 1858, reported to Congress that

> "It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposition of the general government, and that in the absence of one, the other would be a good and valid grant."

The Senate Committee on Private Land Claims, on May 19, 1860 (Rep. Com. No. 228, Sen. 36th Cong., 1st Sess.) reported that the grant to Baca "was in fee, and is a genuine and valid title." The committee further reported, that as the heirs of Baca had expressed a willingness to waive their older title in favor of the settlers under the grant to the Town of Las Vegas, Congress should legislate to accomplish that purpose.

In pursuance of this recommendation Congress, by an act entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860 (12 Stat., 71), enacted, among other things by Section 3:

> "That the private land claims in the Territory of New Mexico as recommended for confirmation by the Surveyor General in his report * * * and numbered from twenty (being the grant of 'Las Vegas Grandes') to thirty-eight, both inclusive, be and the same are hereby confirmed."

It was further enacted by Section 6:

> "That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the Town of Las Vegas to select instead of the land claimed by them an equal quantity of vacant land, not mineral in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number; and it shall be the duty of the Surveyor General of New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them, provided, however, that the right hereby granted shall continue in force for three years from the passage of this act, and no longer."

This Act, as amended by the Senate, was finally passed by the House on June 21, 1860, and approved the same day (*Cong. Globe, 1st Sess. 36th Cong., Part*

IV, pp. 3213, 3216, 3291). It is, therefore, unnecessary to construe the word "passage."

Before the selection in this case, the Territory of Arizona had been formed out of New Mexico; just as in the Shaw case, Colorado had been formed out of the latter territory before the selection in that case.

Confirmation by Third Section.

The third section of this statute confirmed to the heirs of Baca the land granted to their ancestor, Luis Maria Baca. It passed the title of the United States to this land as effectually as if it contained in words a grant *de novo*.

Shaw v. Kellogg, 170 U. S., 312, 331.

Intent of Sixth Section.

The sixth section made two grants: The first, of a power to select in lieu of Las Vegas; and the second of the right, "when required" by the heirs, to a subsequent survey of the land taken in execution of the power.

The power *"to select"* is defined in the proviso thereto as a *"right hereby granted."* This is equivalent to "the grant of the right to take" and constituted a *"grant in praesenti of lands to be thereafter identified"* (*Stalker v. Oregon Short Line*, 225 U. S., 142, 146, 148; *Noble v. Union River Logging R. R. Co.*, 147 U. S., 165, 172, 176); and on the Department's approval of the propriety of the exercise of that right in the manner prescribed by it, title vested (*Stalker case*, pp. 148, 151 and 153; *Michigan Lumber Co. v. Rust*, 168 U. S., 589, 592; *Noble case, supra*, pp. 172, 176). In the Stalker case the evidence of the exercise of the power was, under a Department regulation, a plot of

the station grounds selected; in the case at bar, the Department regulation required "distinct descriptions and connections with natural objects" (Printed Record, pp. 5 and 6), when the lands selected were beyond the public surveys. The Commissioner had the unquestioned right to make regulations to "fill in the details" as to which no specific provision was made in the statute (*U. S. v. Grimaud*, 220 U. S., 506, 516, 517, 520; *Leonard v. Lennox*, 181 Fed., 760, 766, Opinion by Mr. Justice Van Devanter).

This section, therefore, granted to the heirs, *in praesenti*, a power in land and also a right to a subsequent survey. If they accepted and properly executed that power, the execution of it would vest in them the fee simple title to the lands by them selected in lieu of the lands of "Las Vegas Grandes," and would give them the right to the survey when they requested it. Their title would rest upon and be granted by the Statute of June 21, 1860, creating the power; and on the Commissioner's approval of the propriety of the selection it would take effect as if conveyed by that statute.

> *U. S. v. Detroit Lumber Co.*, 200 U. S., 321, 334, 335.
> *Weyerhaeuser v. Hoyt*, 219 U. S., 380, 388.
> *Stalker v. Oregon Short Line*, 225 U. S., 142.

To execute this power only two acts were necessary; first, a seasonable selection by the heirs in due form of a tract of land claimed by them to be of the character specified in the act; and second, an approval on behalf of the United States of the propriety of the selection. The subsequent survey which it was "the duty" of the Surveyor General to make when requested by the heirs, was the second or collateral right conferred by the statute and its exercise would not be necessary until the heirs in their convenience required it, and then would simply be an official identification

on the ground of the description in the notice of selection (*Glasgow v. Hortiz*, 1 Black, 595, 601, 602).

In the execution of the power granted by the sixth section of the Act, the Government had an equal interest with the heirs of Baca—an exchange of lands was contemplated; and Congress was desirous of making the exchange so that the inhabitants of Las Vegas —strangers to our laws and language and unfriendly to our sovereignty over them—would not be disturbed in their possessions and settlements (*Maese v. Herman*, 183 U. S., 572, 580, 581).

The United States has in fact received the full consideration for the relinquishment by the heirs of their title to Las Vegas. This Court has decided that the title of the heirs to Las Vegas was divested (*Maese v. Herman*, 183 U. S., 572); there could not be a divestiture of title to Las Vegas until there was an investiture of title to the land selected in lieu thereof.

In fact, in *Maese v. Herman, supra*, p. 579, this Court said that the heirs had located and taken five tracts in lieu of their title to Las Vegas.

Conditions of Grant.

The conditions attached by the statute to the execution of the power were four: First, that the land selected should be located in New Mexico; second, that such selections should be square in form and not exceed five in number; third, that the land selected and located should be adjudged vacant and not mineral; and fourth, that such selection should be made within three years from the passage of the statute.

The word "vacant" means "unoccupied" (Shaw Case, p. 332); and by "land not mineral" is meant land which is not chiefly valuable for that purpose, to an extent justifying exploitation; the mere fact that there might be prospect holes, shafts, etc., of ex-

hausted or abandoned mining operations, is insufficient to characterize the land as mineral land.

Davis v. Weibhold, 139 U. S., 507, 519.
Northern P. R. R. Co. v. Soderberg, 188 U. S., 526.
Colorado Coal Co. v. U. S., 123 U. S., 307.
Deffeback v. Hawke, 115 U. S., 392.
Shaw v. Kellogg, 170 U. S., 312, 340.

The words "vacant land not mineral" are words of description and not of reservation, exception or condition subsequent (*Shaw Case*).

Decisions of Lower Courts.

Both the lower Courts decided herein that when the Commissioner of the General Land Office approved the selection and location by the Baca heirs of the tract of land in question and unconditionally ordered the survey of it (Printed Record, pp. 299, 300), the title of the Government to the land was divested, and became vested in the heirs of Baca: in other words, that the Commissioner before making such order, had determined that the conditions imposed by the statute on the execution of the power had been complied with, and that this selection and location made by the heirs of Baca was of public land "vacant and not mineral."

Act Should be Liberally Construed.

The provisions of the sixth section of the Act of 1860, should be liberally construed in favor of the appellees.

Their predecessors in title (the heirs of Luis Maria Baca) waived their senior title to the Las Vegas grant, and accepted in lieu thereof the provisions of the sixth section of the Act of 1860, in order to ac-

commodate the United States and some of the settlers in its new territory.

This fact, as well as the intention of Congress to induce the Baca heirs to surrender their rights to Las Vegas in favor of the settlers, is clearly set forth in the recent case of *Maese v. Herman*, 183 U. S., 572.

Congress intended to make its offer so attractive as to induce the heirs to accept it. The territory in which they could select their new land was then deemed of little value, as Justice Brewer pointed out in the Shaw case. It was arid, without railroads and very sparsely populated. Most of it (including the land selected in this case), was far beyond any of the public surveys or even private settlements, and the most savage of all the Indians, the Apaches, held dominion over it. No one dreamed then of the wonderful growth and delevopment of the Southwest. Under such circumstances, the Baca heirs, at the request of Congress, gave up their senior title to an inhabited town site.

Any mere informalities in the Land Department record should be construed most strongly in favor of the appellees, especially as neither they, nor their original grantors, can take back any interest in the Las Vegas grant. Every presumption should be in their favor, and they should have the benefit of every doubt.

IV.

Procedure under the Act of 1860.

After the election by the Baca heirs to take under the Act of 1860, and the determination of the acreage of the Las Vegas Grant, the various steps contemplated by the Act of 1860, were as follows:

First: Selection by the heirs within the time limit of a square tract of land of proper size claimed by them to be vacant and non-mineral.

Second: Filing of a certificate of selection with the proper Surveyor General, who, under the instructions of the Department, was to send it to the Department with his approval or disapproval thereof.

Third: Approval of the selection by the Commissioner of the General Land Office, although the statute was silent as to who should act for the Government. Congress certainly intended that some Government officer should act, and the Commissioner was the one intended.

> *Bishop of Nesqually v. Gibbon*, 158 U. S., 155, 166, 167.
> *U. S. v. Barnes*, 222 U. S., 513, 521.
> *Cosmos Co. v. Gray Eagle Co.*, 190 U. S., 301, 309.

His approval of the selection would pass the title, as the final adjudication that the power had been properly exercised; it would be the "final act" to which any discretionary power was attached, and would be "equivalent to a patent."

> *Beley v. Naphtaly*, 169 U. S., 353, 365.
> *Stalker v. Oregon Short Line*, 225 U. S., 142, 148, 151, 153.
> *Louisiana v. Garfield*, 211 U. S., 70, 75, 76.
> *Michigan Lumber Co. v. Rust*, 168 U. S., 589, 592.

The statute did not contemplate a patent (*Shaw v. Kellogg*, 170 U. S., 312, 341, *et seq.*).

Fourth: After the Commissioner had approved the selection, it became the ministerial "duty" of the Surveyor General "to make survey and location" of the

tract "when" the heirs required it. This ministerial duty had nothing to do with the vesting of the title (*Glasgow v. Hortz*, 1 Black, 595, 601, 602). The heirs could take their time about having the survey executed; Congress certainly saw no need for prompt surveys (*Shaw v. Kellogg*, 170 U. S., 312, 334). In a grant under the second section of the Act, there was a direction that it be "immediately" surveyed and segregated; the use of the different adverbs of time is most striking. Of course the heirs were not entitled to the performance of that "duty" until after the approval of the selection; in other words, the word "lawfully" must be read into the statute at this point. The Land Department, as will be pointed out later, held at the time, whenever the question arose in any of the Floats, that its approval of the selection must *precede* survey and location by the Surveyor General. On June 15, 1887, Secretary Lamar (Defendants' Exhibit 29; Printed Record, p. 185) defined "location" as the "designation by approximate boundaries of a specific tract." Justice Field's definition is substantially the same (*Smelting Co. v. Kemp*, 104 U. S., 636, 649). The "survey and location" which it was the "duty" of the Surveyor General to make were the marking of the boundaries and the physical "location" or identification of the land, without any adjudicative authority. *This is exactly what the Solicitor General contended in the Shaw case, in his brief filed in this Court on December 15, 1897* (pp. 16 to 18).

Fifth: Filing of the field notes and plat of survey for the benefit of the heirs and the Government, to serve as a "muniment of title" to the former (Printed Record, pp. 299, 300), and as a technical record of the description in the grant, "for future reference as required by law," and to indicate to the Government

what land remained for other disposal (*Langdeau v. Hanes*, 21 Wall., 521, 530). The right to have a survey made imports the right to have a plat of it filed as a public record.

Duty of Surveyor General.

It is conceded that the certificate of selection (Printed Record, pp. 6, 13), was seasonably filed with the Surveyor General of New Mexico, whose power to act will be demonstrated in a subsequent point.

The *statute* did not give him any adjudicative power; it only stated his subsequent "duty." Nor was any adjudicative power either prior or subsequent to the approval of the location by the Commissioner, an attribute of the *general statutory power* of the Surveyor General (*Barden v. Northern Pac. R. R. Co.*, 154 U. S., 288, 320); in fact, the exercise of such a power by him was expressly prohibited by an Act entitled "An Act for the survey of grants or claims of land," approved June 2, 1862 (12 Stat., 410), which was not repealed until February 28, 1871. This Act provided:

> "But nothing in the law requiring the executive officers to survey land *claimed or granted under any laws of the United States* shall be construed either to authorize such officers to pass upon the validity of the titles granted by or under such laws, or to give any greater effect to the surveys made by them than to make such surveys *prima facie* evidence of the true location of the land claimed or granted, nor shall any such grant be deemed incomplete for want of a survey or patent when the land granted may be ascertained without a survey or patent."

The Commissioner of the General Land Office on July 26, 1860, particularly defined and regulated the

duties of the Surveyor General under the Act (Printed Record, pp. 5, 33), and the location of June 17, 1863, was far beyond any of the public surveys. Under these regulations, the Surveyor General's duties, outside of those specified in the Act, were to transmit the certificate of selection to the Commissioner with an advisory certificate as to the character of the land (Shaw case, pp. 334 and 335). Justice Brewer's subsequent statement that the Surveyor General had adjudicative jurisdiction "in the first instance at least" of the lands "by him surveyed and located" referred to the Commissioner's regulations and must be read in connection with the facts of the Shaw case, where "survey and location" preceded any adjudication of the propriety of the selection, although the Commissioner had sharply disapproved of the contract for the survey as absolutely untimely, having preceded the approval of the selection (Shaw case, pp. 316 to 318).

Commissioner's Jurisdiction Discretionary and Final.

The powers to be exercised by the Commissioner were necessarily discretionary. In such case the rule is well settled that, whenever a statute gives discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of those facts. (*Martin v. Mott*, 12 Wheat, 19, 31; *United States v. Arredondo*, 6 Pet., 691, 729; *United States v. California, &c. Co.*, 148 U. S., 31, 43.)

The Commissioner's functions were judicial in their nature (*Weyerhaeuser v. Hoyt*, 219 U. S., 380, 388); and his discretion could not be reviewed by the Secretary, and the Secretary's discretion thereby sub-

stituted for that of the Commissioner, in the absence of express statutory authority therefor (*Butterworth v. Hoe*, 112 U. S., 50, 56, 67). Although the Act of July 4, 1836 (now R. S. Sec. 453) provided that the Commissioner's *executive* duties should be under the direction of the Secretary, every act of the Commissioner would in contemplation of law be that of the Secretary, even if the statute had given the latter the sole power of approval (*U. S. v. Chicago, M. & St. P. Ry. Co.*, 218 U. S., 233, 243 and cases cited). Their jurisdiction may have been concurrent (*Knight v. Land Association*, 142 U. S., 161, 177) and either officer might have revoked a determination of the Commissioner before the passing of legal title, but the Secretary's supervisory power would be neither unlimited nor arbitrary (*Ballinger v. Frost*, 216 U. S., 240, 248 and cases cited). After the passing of title, however, "no officer had any power over the matter whatever" (*Beley v. Naphtaly*, 169 U. S., 353, 365).

After the exercise of the discretion, the Courts will not entertain an inquiry as to the extent of the Commissioner's investigation, his knowledge on the points decided, or the methods by which he reached his determination (*De Cambra v. Rogers*, 189 U. S., 119, 122). The only determinative consideration is, what final action did the Commissioner take in the exercise of his discretionary power.

When the Commissioner had acted finally and the title had vested in the heirs of Baca, a legal presumption arose that every prerequisite to the grant had been performed both by the Government and the heirs, and no negligence or omission, prior or subsequent thereto, by any Government officer, can affect it (*Stalker v. Oregon Short Line*, 225 U. S., 142, 153; *Lytle v. Arkansas*, 9 How., 314, 333; *Patterson v. Jenks*, 2 Pet., 216, 237; *Glasgow v. Hortiz*, 1 Black, 595, 601, 602).

The adjudication of a question of fact, or of mixed law and fact, by one Commissioner, constitutes an absolute adjudication, and cannot be reviewed after the passing of legal title by any subsequent Commissioner, or by the Secretary of the Interior or any other executive officer; nor by the Courts, except in a direct action by the United States to annul the grant.

U. S. v. Schurz, 102 U. S., 378, 396, 402 to 404.
U. S. v. Stone, 2 Wall., 525.
Whitcomb v. White, 214 U. S., 15.
Beley v. Naphtaly, 169 U. S., 353, 365.
Moore v. Robbins, 96 U. S., 530, 533.
Noble v. Union River Co., 147 U. S., 165, 176.
Heath v. Wallace, 138 U. S., 573, 585.
School v. McAnnulty, 187 U. S., 94, 108.
Barden v. N. P. R. R. Co., 154 U. S., 288, 330.
Gardner v. Bonestell, 180 U. S., 362, 370.
Johnson v. Drew, 171 U. S., 93, 99.
Burfenning v. Chicago Ry., 163 U. S., 321, 323.
Steel v. Smelting Co., 106 U. S., 447, 450, 451.
Lee v. Johnson, 116 U. S., 48, 51.
Ballinger v. Frost, 216 U. S., 240.

In some of the above cases, particularly in the *Moore, Schurz and Ballinger* cases, the Secretary, after title passed, attempted to exercise for the first time his supervisory powers, but it was held that he, as well as the Commissioner, was *functus officio* after legal title had passed from the United States (see also *Beley v. Naphtaly*, 169 U. S., 353, 365).

In the *Schurz* and *Ballinger* cases, an uncompleted ministerial act was unsuccessfully attempted to be used by the Secretary as the basis for reopening matters.

V.

The case at bar is largely governed and controlled by Shaw vs. Kellogg, 170 U. S., 312.

Shaw v. Kellogg was decided in May, 1898, and related to Baca Float No. 4, and we trust we may be pardoned a full analysis of that case.

The Facts in the Shaw Case.

The certificate of selection in that case, signed by John S. Watts, in behalf of the Baca heirs, was filed on December 12, 1862, with Surveyor General Clark of New Mexico, who immediately transmitted it without taking any action thereon to the Land Department at Washington. Mr. Clark also sent a copy to the Surveyor General of Colorado, as subsequent to the passage of Act of June 21, 1860, the territory of Colorado had been formed out of New Mexico, and its Surveyor General given *all* the powers, duties and responsibilities of the Surveyor General of New Mexico (12 Stat. L., 172).

The Surveyor General of Colorado on February 24, 1863, wrote to the Land Department acknowledging receipt of a copy of the certificate of selection and added:

> "I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca 'floats' and should locate it as this is located for the reason that, in his opinion, it would cover rich minerals in the mountains."

At the very outset, therefore, before there was any attempt to pass upon the location, there was more

than a suspicion on the part of Government officials that the selection was improper and not in conformity with the Act of 1860.

The Land Department, on March 13, 1863, wrote to the Surveyor General that before the selection could be approved by it, certificates must be furnished by him and by the Register and Receiver that the land was vacant and not mineral.

During the year 1863, ex-Governor Gilpin applied to the Surveyor General for a survey of the location. As the land was beyond all public surveys, the Surveyor General of Colorado contracted with one Sheldon for a survey of the float, and forwarded the contract to the Department for approval. On November 2, 1863, the Department wrote to the Surveyor General of Colorado, disapproving the contract, and very sharply called attention to his original letter of transmission and instructed the Surveyor General that when he was satisfied that the tract was vacant land and not mineral, he should so certify to the Department, and that the survey must be postponed until the vicinity be reached in the regular progress of the public surveys.

It will be seen, therefore, that no one then understood the actual execution of the survey, to have any other function than to furnish an authoritative plotting of the lands, with reference to regular official lines, *after the validity of the selection had first been recognized by the Department.*

This survey, however, had proceeded without waiting for the approval of the Department. From the field notes of the survey (printed record in Shaw case, pp. 39 to 52) it appears that it was begun on October 22, 1863, and concluded on November 4, 1863—two days after the Department had written to the Surveyor General of Colorado disapproving of the contract.

The field notes show that all Sheldon did was to "run the lines" of the boundaries; he made no attempt to explore the grant or even to cross it. The survey only marked the boundaries. Sheldon's affidavit attached to the field notes (see above record) states that the survey was made only of the "*exterior boundaries*" of the grant, and the only reference in the field notes to minerals or the lack of them is a statement by Sheldon that he

> "saw no indications of precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle as set forth in the notes" (opinion, p. 323).

On December 5, 1863, the Surveyor General of Colorado issued a certificate that from good and sufficient evidence he was perfectly satisfied that the grant marked out by the Sheldon survey was not mineral and was vacant, and on the same day a similar certificate was signed by the Receiver and by the Register.

On December 12, 1863, these two certificates were sent by the Surveyor General of Colorado to the Land Department with a long letter of enclosure, giving the grounds on which he signed the certificate and stating that such grounds were satisfactory to him (printed Shaw record, pp. 38 and 39, partly printed on pp. 318 and 319 of opinion). *He did not base his belief in any way on the Sheldon survey or field notes and his reference thereto in his certificate of December 5, 1863, is only a reference to a map.*

On January 16, 1864, the Land Department replied, to the effect that the evidence furnished was not sufficient to prove that the grant did not cover valuable mineral deposits, especially on account of the statement of ex-Governor Gilpin, officially communicated to the Department as above stated, and the Department expressly withheld its approval of the location.

The letter of December 14, 1863, referred to in the Department's letter was the letter of December *12*, 1863, as will appear from the quotations therefrom.

On February 12, 1864, however, the Commissioner evidently having reconsidered his previous action, wrote to the Surveyor General of Colorado impliedly accepting his certificate; and after criticising the manner in which the survey was procured, authorized the Surveyor General to subject the field notes to the usual tests, and if they were found regular, to approve the survey; but directed the Surveyor General to add to his certificate of approval the "special reservation" expressed in the Act of 1860, that the grant was not to embrace mineral lands nor to interfere with any vested rights if such existed. The Commissioner further stated that the act did not authorize the issuance of a patent, and that the law itself with the approved plat would constitute the evidence of title.

On February 26, 1864, the Commissioner again wrote the Surveyor General returning various papers to him for such action as he might deem proper in accordance with previous letter.

On March 15, 1864, the Surveyor General of Colorado certified that the field notes and the survey they described were approved by him. On March 18, 1864, a plat of the survey of the "boundary lines" of the grant was certified by the Surveyor General to be correct "subject to the conditions and provisions of Section 6 of the Act of Congress, approved June 21st, 1860."

On March 29, 1864, a transcript of the field notes and a plat of the survey with his approval entered thereon, was forwarded by the Surveyor General to the Land Office; and on May 4, 1864, the Land Office acknowledged their receipt in a very brief letter.

As stated on page 323 of the opinion of the Court "these were all the proceedings had at the time in ref-

erence to the location, survey, and transfer of title of this grant."

Subsequently several unsuccessful attempts were made to have a patent issued, but the Department held that title had passed and that there was neither authority nor necessity for a patent.

Minerals were subsequently discovered on the grant. A lessee of a mine, after the expiration of his lease, was refused a renewal and thereupon took possession of the mine, and ejectment proceedings were started to oust him.

Decision of This Court.

This Court held that the words "vacant lands, not mineral" in the Act of 1860 were words of description, and not of condition subsequent, exception or reservation; that only lands then known to be mineral were meant to be an improper selection; that when their character had once been determined by the Government, the location was perfected and title passed (Shaw case, p. 334), without the issuance of a patent, and that the future discovery of mineral or of evidence thereof did not divest it; that it was the duty of the Government "to decide and not to decline to decide," and that title having passed, the subject clause in the subsequent approval of the plat was inoperative and void.

This Court stated that it was the duty of the Surveyor General under the Commissioner's regulations to determine in the first instance at least the character of the lands, but that his decision was subject to the approval of the Commissioner. The Court stated, *quoting from a Land Department decision*, that the character of the land was determined by the Surveyor General "in 1864" to be non-mineral, and that the location was then perfected and title passed (p. 334 of

Opinion). The quoted date is inaccurate, as the determination by the Surveyor General and the Register and Receiver was in December, 1863; the approval thereof by the Commissioner was made on February 12, 1864. All that the Surveyor General did in 1864 was to approve the field notes of a private survey and to make a qualified approval of the plat of it, in accordance with specific instructions from the Land Department, after it had accepted and impliedly approved his certificates of December, 1863, as to the character of the lands. The Department understood that the adjudication by the Surveyor General was in 1863, and that the approval of location had preceded the approval of the survey by the Surveyor General, as will appear by its letters of March, 1879 and June 28, 1884, quoted on pages 325 to 327 of the opinion.

The Court refers to the lands "surveyed and located" by the Surveyor General. This reference was to the peculiar facts of the case, as contrary to the instructions of the Department, a private survey had been made and completed two days after the Department had sent a letter disapproving of the contract for it as absolutely untimely and irregular, having preceded the approval of the location.

When Title Passed.

It was the action of the Commissioner on February 12, 1864. which passed the title; *not his letter of May 4, 1864, simply acknowledging receipt of the plat of survey,* nor the Surveyor General's approval of the accuracy of the survey and field notes. It is conceded that only the Commissioner could sanction the passing of legal title.

This Court held, on page 337 and 338 of the opinion in the Shaw case, that it was the Commissioner's approval of the location, the adjudication as to its propriety, "with no reservation of the matter for fur-

ther consideration in the Land Department or by the Surveyor General" which made the matter "a finality so far as they were concerned."

In the Shaw case it was not necessary for this Court to state just when "in 1864" legal title did pass. Legal title therein certainly did not pass by the mere making of the survey, as all that the surveyor did was to run the exterior boundaries; that work was done in 1863, before there was any certificate or adjudication of the propriety of the selection. Besides, Justice Brewer, who wrote the opinion in the Shaw case, said in a case which dealt entirely with the matter of surveys:

> "The survey is one thing and the title another. * * * A survey does not create a title; it only defines boundaries" (*Russell v. Maxwell Land Grant Co.*, 158 U. S., 253-259).

Furthermore the Act of June 2, 1862 (12 Stat., 410) provided that a survey should not have any adjudicative effect, but only serve as *prima facie* evidence of true location, and that no Congressional grant should

> "be deemed incomplete for want of a survey or patent when the land granted may be ascertained without a survey or patent."

Legal title certainly did not pass in the Shaw case on March 15, 1864 when the Surveyor General approved the field notes and survey of the exterior boundaries; nor on March 18, 1864, when the Surveyor General endorsed on the plat of survey:

> "The above map of the *boundary lines* of Grant No. 4 of the heirs of Luis Maria Baca * * * is strictly conformable to the field notes on file in this office, which have been examined and approved, subject to the conditions and provisions of Sec. 6 of the Act of Congress approved June 21st, 1860."

The same great Justice said in the *Russell* case (p. 259)

> "Conceding the accuracy of the survey is not an admission of title."

All that the Commissioner did on May 4, 1864 was to acknowledge the receipt of the plat and field notes of a survey of the "boundary lines" of the grant.

Under the case of *Langdeau v. Hanes,* 21 Wall., 521, 530, approved in the Shaw case (p. 341), segregation by survey is not necessary to pass title, *"when there is a specific tract capable of identification,"* such as in the Shaw case, although the description used therein is much more complicated than in the case at bar, *and was attacked in this Court as being too indefinite.*

Besides, the making of such a survey and of its plat is a ministerial act, not only in fact (*Glasgow v. Hortiz,* 1 Black 595, 601, 602), but at that time, by statute also, because of the provisions of the Act of June 2, 1862, *supra.* The Commissioner's approval of the propriety of the selection on February 12, 1864 was a judicial act (*Weyerhaeuser v. Hoyt,* 219 U. S., 380, 388).

In the Shaw case, where survey was not necessary to pass title, where the survey was only of the "exterior boundaries," where the plat of survey was approved only as correctly showing "the boundary lines," certainly it must have been the *judicial act* of the Commissioner on February 12, 1864 which passed the title, not any of the subsequent ministerial acts, all of which were done in exact accordance with the directions in the Commissioner's decretal letter of February 12, 1864.

Comparison of Fact.

In the Shaw case, every Government official proceeded with caution and suspicion, because of Governor Gilpin's remarks as to the location. In the case at bar, the Department was not put on inquiry and notice of possible fraud.

The letter, order and decretal memorandum of April 9, 1864 in the case at bar (printed record, pp. 299, 300) are very much stronger and more formal than the Commissioner's letter of February 12, 1864 in the Shaw case.

"Survey and location" in the Shaw case preceded any adjudication or approval of the propriety of the selection, and this the Commissioner denounced as improper in his letters of March 13, 1863 and November 2, 1863 (Opinion, pp. 316 to 318). In the case at bar, "survey and location" were ordered by the Commissioner on April 9, 1864, when he accepted and adopted the Surveyor General's approval of the propriety of the location, in exact accordance with his understanding of orderly procedure under the act. "Survey and location" were afterwards made in the case at bar, and are admittedly correct (Printed Record, pp. 11 and 36), but the appellants refuse to file the approved plat of survey, still claiming jurisdiction to pass on the propriety of the location, although the Commissioner on April 9, 1864 in the case at bar reserved nothing "for further consideration in the Land Department or by the Surveyor General" (Shaw opinion, p. 337).

VI.

Legal title herein passed from the United States on April 9, 1864.

We contend that on April 9, 1864, the United States was divested of its legal title to the land involved in this case, when the Commissioner of the General Land Office, in the final exercise of discretionary and judicial authority: (a) Accepted and adopted the approval of the location by the Surveyor General of New Mexico as sufficient "to perfect title" thereto in the heirs of Baca; (b) ordered a simple survey thereof, "to run the lines indicated" in the certificate of selection; and (c) directed that there be forwarded to the Land Office a transcript of the field notes and a plat of the survey, "for future *reference* as required by law" to serve as the "muniment of title, the law not requiring the issue of patents on these claims" (Printed Record, pp. 299, 300).

The Commissioner in his instructions under the Act (Printed Record, pp. 5 and 6) required certificates as to the propriety of the selection from the Surveyor General of New Mexico, and from the Register and Receiver. There was nothing in the Act of 1860 requiring such certificates, and they were furnished only because the Commissioner required them for his own information. They were simply advisory to him; he certainly would not have been bound by them, as he had the judicial power and those officers were his subordinates. As he had the right to specify the means of information, he had the right to dispense therewith, or waive his requirements, for any reason he might deem proper (*Lytle v. Arkansas*, 9 How., 314, 332).

Adjudication by Surveyor General.

We shall demonstrate later that the Surveyor General of New Mexico, and not of Arizona, was the proper officer to receive and certify in the first instance to the propriety of the location, especially as the Commissioner's instructions were directed to the Surveyor General of New Mexico (Printed Record, pp. 5 and 6).

In his certificate to the notice of selection (Printed Record, pp. 157 and 158), the Surveyor General of New Mexico used the words, *"said location is hereby approved,"* thereby certifying to the absolute propriety of the selection.

The word "approve" is defined as follows:

In the Century Dictionary, Vol. 1, page 279:

> *"To sanction officially; to ratify authoritatively; to pronounce good;* to think or judge well of; *to admit the propriety* or excellence of."

And in Webster's International Dictionary, 1870, page 740:

> *"To sanction officially;* to ratify; to confirm; to regard as good; to commend."

And in the Standard Dictionary, 1895, Vol. 1, page 103:

> *"To pronounce good, proper or legal; give sanction to, as by official act;* ratify; confirm."

And in Webster's Dictionary, 1849, page 63:

> *"To admit the propriety of."*

Besides, the word "approved" is the one word commonly used to indicate complete, unqualified and unconditional sanction. A bill becomes a law, after passage by Congress, when it is "approved" by the President. Throughout the opinion in the Shaw case,

the Surveyor General's certificate of December, 1863, is spoken of as "the *approval*" of the selection, to summarize in one word the contents of his certificates of December 5th and 12th, 1863.

The words, "said location is hereby approved," meant and constituted an official sanction, an authoritative ratification, an admission of the absolute propriety, and a declaration of the legality, of the selection. They were like a general verdict.

The Statute contemplated quick and *decisive* action, for as stated on page 331 in the Shaw case:

> "The thought was that these claims should not only be finally but speedily disposed of. It was not contemplated that the title should remain unsettled, a mere float for an indefinite time in the future."

In this case, the certificate of selection (Printed Record, p. 6) was handed to the Surveyor General four days before the final day allowed by the Statute. It came from a highly reputable source. The Surveyor General of New Mexico had no evidence of any kind against the validity of the selection. It was not known to him, or believed by him, to be of a mineral nature or non-vacant. He first absolutely approved the location (Printed Record, pp. 7 and 8) and thereafter on April 2nd, 1864 (Printed Record, p. 161), certified that there was no evidence in his office (the only place to find such evidence and the only officer to have it, or to know of any belief of the mineral character of the lands) that the land selected was occupied or contained any mineral. He did not say there was no evidence of any kind; what evidence he had naturally does not now appear. What he ascertained at the time of the approval was sufficient for him and he gave an absolute unqualified approval. In the certificate of selection was the written assurance of Judge Watts (then the delegate to Congress, and a

former Justice of the Supreme Court of New Mexico, and later its Chief Justice, as will appear by the New Mexico law reports), that the land was entirely vacant, unclaimed by any one and not mineral to his knowledge. That was some evidence on which the Surveyor General could act and is sufficient to support his approval of the facts stated in the notice.

The latter part of the Surveyor General's letter of April 2, 1864 (Printed Record, p. 161), meant that he could only certify *of his own knowledge*, after a personal examination of the land. As the same Commissioner had, on February 12, 1864, in the Shaw case, withdrawn his request of January 16, 1864, for certificates on absolute knowledge, he could not consistently require personal knowledge from the Surveyor General in the case at bar; the Commissioner's letter of July 18, 1863, in the case at bar (Printed Record, p. 8), is similar to his letter of January 16, 1864, in the Shaw case; and on April 9, 1864, he waived the requirement for certificates on personal knowledge in the case at bar, just as on February 12, 1864, he waived such requirement in the Shaw case.

Certificates of Register and Receiver.

It is conceded that certificates were made out by the Register and Receiver on March 25, 1864 (Printed Record, p. 165) in proper form, but the appellants contend (only from inferences) that these certificates or their contents were not before the Commissioner on April 9, 1864, and that, therefore, he had no right to exercise his judicial function.

Outside of the letter of the Second Assistant Postmaster General (Printed Record, p. 144) *which was not put in evidence in this case*, and which only discussed *mail routes*, the only evidence adduced by the

appellants that the certificates were not received prior to April 9, 1864, is the unsigned rubber stamp endorsement on the letter written by Judge Watts to Mr. Wrightson, enclosing the certificates; this endorsement showed that the letter of enclosure was received about May 26, 1864, either in the first instance or from Surveyor General Bashford, to whom they might have been sent on April 9, 1864. There was no such endorsement upon the certificates themselves. There is nothing from which the court can take judicial notice that the certificates were not, in fact, before the Commissioner on April 9, 1864; the unsigned rubber stamp endorsement on the supposed letter of enclosure is no evidence of the time of first actual receipt by the Land Department either of the letter or the certificates. They may have been sent by special messenger and on their receipt, transmitted with the letter of April 9, 1864, which referred to enclosed papers; and the stamped date may have been the date when they came back to the Department.

On the copy of the letter of April 2, 1864, in the possession of the Land Office, there appear on the margin the word: "See letter fr. Hon. Watts of March 27, 1864 enclosing R. &. R. certificates" (Printed Record, p. 338).

Irrespective of any speculation as to the time of actual receipt, it must be admitted that the certificates were simply those required by the Commissioner for his own information, and that he had the right to act without waiting for their receipt, just as he had the right to act either in reliance of the statements therein contained or in absolute disregard thereof.

In the letter (Printed Record, p. 159), transmitting the certificate of selection and approval to the Commissioner of the General Land Office, the Surveyor General of New Mexico said that he deemed it unnecessary to secure certificates from the Register and Re-

ceiver as to the character of the land selected, owing to the fact that the location was far beyond any of the public surveys and, therefore, they could not officially know anything concerning it. Until the regular public surveys included the region of the tract, these officers naturally would not have any official knowledge of it, as their duties were clerical. In reply (Printed Record, p. 160), the Commissioner of the General Land Office asked for such certificates, and certificates were in fact made out by the Register and Receiver, under date of March 25, 1864 (Printed Record, p. 165), to the effect that the land was vacant and not mineral, so far as the information in their respective offices showed. The Surveyor General's letter of April 2, 1864 (Printed Record, p. 161) reiterates his previous statement that the Register and Receiver, whose offices and his were in the same little town of Santa Fe, had no official knowledge of the land.

The only essential inquiry is: Did the Commissioner on April 9, 1864, have what he believed to be sufficient information on which to act, and did he act, finally and decisively?

Approval by the Commissioner and Order of Survey.

On April 9, 1864, the Commissioner had, upon which to base any action he might take:

1. The certificate of selection, signed by Judge Watts, probably the most prominent man in the Southwest at the time, that the land was entirely vacant, not claimed by any one, and not mineral to his knowledge (Printed Record, p. 7).

2. The approval of the location and absolute sanction thereof by the Surveyor General of New Mexico (Printed Record, p. 7).

3. The Surveyor General's letter of June 18, 1863, transmitting the certificate of selection and approval, with the statement that the land was far beyond any of the public surveys, and, therefore, certificates from the Register and Receiver were unnecessary, as in the absence of public surveys, they would have no official knowledge in the matter (Printed Record, p. 8).

4. The certificates of the Register and Receiver, dated March 25, 1864 (Printed Record, p. 9).

5. The Surveyor General's letter of April 2, 1864 (Printed Record, p. 161) that there was no evidence in his office that the land contained any mineral or that it was occupied, and stating his inability to make certificates on his own knowledge.

6. The status of the country at that time, with the Civil War pending, the land in question in possession of the Apaches, and a general belief of the unlikelihood of minerals in that region (Shaw Case, p. 332).

7. The knowledge that the Act of July 22, 1854 (10 Stat., 308), had made it the duty of the Surveyor General to ascertain and report as to all pueblos in that region, the number and extent of each, the number of inhabitants in each pueblo and the nature of their titles; and yet no evidence of occupation of the tract existed in the offices of the Surveyor General, Register, Receiver or in the Land Department.

8. The knowledge that on January 16, 1864, in the location in the Shaw case, he had insisted on absolute certificates on personal knowledge, and on February 12, 1864, had withdrawn such demand, and that consistency required like action in the case at bar.

9. The knowledge that there was no money provided for explorative surveys (Shaw Case,

p. 334); nor for a military force to protect the explorers from the Indians, if such an expedition were sent out.

10. The knowledge that although the matter had been pending since June 17, 1863, with action thereon by the Register and Receiver as late as March 25, 1864, and by the Surveyor General as late as April 2, 1864, and with the Surveyor General then in Washington, there was not even a suspicion in his office, or in the offices of any of his three subordinates, of any impropriety in the selection.

11. Undoubtedly information received from the Surveyor General, who was in Washington on April 2, 1864 (Printed Record, p. 161), and necessarily would have a conference with the Commissioner during his stay there.

12. The knowledge that this was the last of the locations under the Act, and that the previous four made by Judge Watts had already been approved without subsequent trouble.

The Commissioner on April 9, 1864, wrote to Surveyor General Bashford of Arizona, referring to papers "enclosed," by which Mr. Bashford would perceive that the location *"had been approved by the Surveyor General of New Mexico under whose jurisdiction the application properly came at the date of the approval." The purpose of this statement was to advise the Surveyor General of Arizona that his sole duty was to have a survey made, as the selection had already been approved.*

The Commissioner then called the Surveyor's attention to the provisions of the Act of 1860, under which it was the duty of the Surveyor General "to make survey and location of the lands so selected," when required by the heirs. The Commissioner next referred to the Act of June 2, 1862, which he said required such grants to be surveyed at the expense of

the claimants. That Act required only *foreign grants* to be surveyed *at the expense of the claimants.* The "duty" imposed by the Act of 1860 to make survey when required by the heirs, necessarily implied that it should be gratuitously done; they were not to be burdened with the expense of a special survey. The "delay" sought to be avoided was the delay which would occur in those troublous times, if the provisions of the Act of 1862 to which he had referred in his previous sentence should be strictly followed, namely, that all contracts for private surveys should first be submitted to and approved by the Department; in this case the Commissioner authorized the Surveyor General to contract at once for such a survey, on receiving a deposit to cover it.

The Commissioner stated that:

> "Transcripts of the field notes and plat certified in accordance with the requirements of law will be transmitted to this office and will constitute the *muniments of title*, the law not requiring the issue of patents on these claims."

The Commissioner then specified how each corner should be *"perpetuated and marked."*

At the bottom of the Land Office copy of the letter is a memorandum referring to the letters of the Surveyor General of New Mexico, dated June 17 and 18, 1863, approving the selection.

Then the Commissioner endorsed on the Land Office copy of the letter to Bashford a decretal memorandum setting forth that the "statement" of Judge Watts in the Surveyor General's letter of June 17, 1863 (Printed Record, p. 7), and "the certificate of Surveyor General Clark" (Printed Record, pp. 7 and 8),

> *"having undergone a careful examination, the location having been approved by him to perfect title* under the authority of the Act approved

> June 21, 1860, *application for survey having been made, instructions* (copy herewith attached) *have been given* to Surveyor General Levi Bashford of Arizona in which territory the lands located now are, *to run the lines indicated*, and forward complete survey and plat to be *placed on file* for future *reference* as required by law."

The Surveyor General of Arizona was the proper officer to make the survey, as only a simple survey was required, and he then had the sole jurisdiction to make surveys in Arizona. Later, after the office of Surveyor General of Arizona had been abolished by Statute on July 2, 1864 (Printed Record, p. 48), the same instructions for survey were communicated to the Surveyor General of Mexico on September 17, 1864, as he then had jurisdiction (Printed Record, p. 178).

If the Commissioner's letter of February 12, 1864, in the Shaw case (Opinion, pp. 320 and 321), was an acceptance and adoption of adjudicatory certificates, how much stronger in our favor is the letter of April 9, 1864, in the case at bar, and the decretal memorandum attached to the copy thereof? In the Shaw case the Commissioner "declined to decide"; in the case at bar he not only decided, but followed the practice of judicial tribunals by placing on file a memorandum of what he had done, and of his reasons therefor. To adopt the language of the Shaw case (Opinion, p. 337).

> "There was no reservation of the matter for further *consideration* in the Land Department or by the Surveyor General. There was a finality so far as they were concerned."

All that remained to be done was to "run the lines indicated," merely to mark the boundaries, "perpetuate" the corners, and forward a plat of the survey and

a transcript of the field notes, certified to be correct according to a surveyor's standards, "for future reference" (*not action*) as required by law, and to constitute *"the muniments of title,"* not mark the passing of title, but only supply a map of the locality, with the tract indicated thereon, for the use of the Government and the owners.

By reference to the Shaw case it will appear how informal the implied approval of the location was in that case, and how the Commissioner of the Land Office and the Surveyor General assiduously attempted to leave undecided and open for further consideration the provisions of the Act of 1860, as to the character of the lands selected.

In this case there was no attempt to leave anything undecided, *no direction for any report whether the lands were vacant and non-mineral,* no reference to the letter of April 2, 1864, or its contents, and no attempt to put any condition on the approval, in spite of the fact that the letter of the Commissioner in the Shaw case authorizing the Surveyor General to approve the survey, was written less than two months before the *same Commissioner's* letter, order of survey and decretal memorandum of April 9, 1864 (Printed Record, pp. 299, 300), in the case at bar.

We call the attention of the Court to the absence of words of attempted condition and reservation in this case; and to the use of such words in a similar letter written about two months before in the Baca location in the Shaw case, as well as to the use of such words in the conditional order for survey of the attempted amended location of 1866 in the case at bar (Printed Record, p. 52), and in the conditional order for survey of Baca Float No. 5 on May 23, 1866 (Printed Record, p. 289).

The suggestion in the Surveyor General's letter of April 2, 1864 (Printed Record, p. 161), that absolute

certificates could only be obtained by his actual personal *examination* and survey could not be consistently heeded by the Commissioner in the case at bar, because in the interval between his letter of July 18, 1863, in the case at bar and the belated acknowledgment thereof on April 2, 1864, he had changed the practice of the Department; and in the Shaw case a few months before, where there had been suspicious circumstances in the selection, had waived such a requirement. There was no money available to make the explorative examination, with other uses for a military force to protect the explorers, and no belief of any probability of minerals in the arid southwest. Besides, the Act of June 2, 1862 (12 Stat., 410), was a statutory bar to any explorative examination and report by the Surveyor General. As pointed out by Justice Brewer in the Shaw case, Congress did not provide for any explorative examinations; and the Act of 1862 was an incident in a policy not to waste time or money on such surveys.

The Commissioner directed simply the survey of the land, "to run the lines indicated"; he did not direct any explorative work, nor any search for minerals or any report of any kind; nothing but a plat of the survey and the ordinary field notes showing how the surveyor proceeded "to run the lines indicated." The field notes of the approved survey in the Shaw case shows that no attempt was made to examine the land; that was the kind of survey expected by the Department.

Surveyor General Clark, although later somewhat confused as to "certificates" and "proofs," understood the instrument of April 9, 1864, to be a final adjudication, as will appear from his letter to the Commissioner on September 14, 1865, with reference to another Baca Float (Printed Record, p. 288); and the Commissioner's idea as to the finality of an *uncon-*

ditional order of survey is also indicated (Printed Record, pp. 288 and 289).

What the Commissioner *should have done* on April 9, 1864, cannot be considered at this late day:

Barden v. N. P. Ry. Co., 154 U. S., 288, 330.
Shaw v. Kellogg, 170 U. S., 312, 341.

Order for Survey Implied Completed Grant.

A grant delivered out for survey means a perfect title.

U. S. v. Hanson, 16 Pet., 196, 200.
U. S. v. Boisdore, 11 How., 63, 92.

That is the common acceptation of the meaning of an unconditional order of survey in a grant. A survey is never ordered by the Department except *to mark out or define the boundaries* of a tract to which title from the Government has been completed. What could have been the function of the survey in the case at bar, except as the Commissioner stated, "to run the lines indicated" and supply a plat and field notes which would "constitute the muniment of title" (Printed Record, pp. 299 and 300). There are never any words of grant in a plat of survey or its field notes.

In the other Baca Floats (Printed Record, pp. 287 to 290), an unconditional order for a survey was always understood and recognized as a final adjudication by the Department of the propriety of the location. These orders when given unconditionally were only given after the Department had accepted some approval of the location or some certificates as to the character of the land. No evidence or proof was ever asked for or received thereafter and no action ever taken by the Department except merely to receive the

survey and file it. In one or two cases patents were issued, but only after the Department had receded from its position that patents could not be issued.

Nothing is clearer in this case than that an unconditional order by the Commissioner for a survey was always meant and understood to be absolutely final, and to mark a divestiture of title from the Government.

Commissioner's Action Sufficient to Pass Title.

The Commissioner's power to adjudicate finally has been separately treated herein.

The Act of 1860 did not contemplate a patent; the Department has repeatedly so held, and its contentions in that respect have been expressly approved by this Court. (*Shaw v. Kellogg*, 170 U. S., 312, 339 to 343.)

In the latter case, particularly on pages 336 to 338, the acceptance without disapproval by the Commissioner of the Surveyor General's certificates of the propriety of the selection—termed by the Court the "approval" of the selection—was held sufficient to pass title. In the case at bar, the proper Surveyor General used the words: "Said location is hereby approved," and the Commissioner accepted that as sufficient *"to perfect title"* (Printed Record, p. 300). As the title was then perfect, the execution of the order of survey would add nothing to its completeness.

In *Louisiana v. Garfield*, 211 U. S., 70, 75, 76, the words:

> "Approved to the State of Louisiana under the Act of Congress of March 2, 1849, as supplemented and enlarged by the Act of Congress of September 28, 1850,"

were held to be sufficient to pass title, notwithstanding the Secretary's reference to the Act of 1850, or his understanding or intention as to the necessity for subsequent patent.

Where the statute does not contemplate conveyance by a patent, title passes either under the act itself or by an approval of the propriety of a selection thereunder. (*Michigan Lumber Co. v. Rust*, 168 U. S., 589, 592, and cases cited; *Noble v. Union River Logging R. R. Co.*, 147 U. S., 165, 172; *U. S. v. Montana Lumber Co.*, 196 U. S., 573, 577, where however by special Act title remained in abeyance until cost of survey was paid); and *such approval "would be equivalent to a patent."* (*Beley v. Naphtaly*, 169 U. S., 353, 365.)

Where there was a "grant of a right to take" lands for station buildings, etc., the exercise of that power by the railroad company, with the approval of the Department, vested the title, notwithstanding the noncompliance by the Register with a Department regulation requiring the notation of the lands approved on a certain map in his office. (*Stalker v. Oregon Short Line*, 225 U. S., 142.)

VII.

The approval of the location in the case at bar was made by the proper Surveyor General.

Great stress is laid in recent decisions of the Land Department, and in the appellants' printed answer, upon the point that the Surveyor General of New Mexico, when he approved the location in the case at bar, had no authority to take any action thereon and, therefore, the matter is still open for action by the Land Department.

The appellants rely upon the Act of Congress, approved February 24, 1863 (12 Stat., L. 64), entitled "An Act to provide a temporary government for the territory of Arizona and for other purposes," although the printed answer admits that such temporary government was not in fact set up in Arizona until January, 1864 (Printed Record, pp. 48 and 156).

If any answer be needed to the appellants' contention, we submit the following propositions:

1. Whether the Act of 1860 gave the Surveyor General any adjudicatory jurisdiction, or whether he derived it solely from the Commissioner's regulations (Shaw case, p. 335), it was exercised by the official *expressly named in the statute and in the regulations.*

2. The Act of 1863, above stated, provided for a Surveyor General of Arizona and gave him only the powers conferred upon the Surveyor General of New Mexico *"by the Act organizing the territorial government of New Mexico."*

The Act of June 21, 1860, under which the Baca heirs were given the right of selection, had nothing to do with "organizing the territorial government of New Mexico," but was a special Act creating in favor of special claimants a special right to be exercised in a special way.

3. The proviso attached to the Act of 1863 creating the territorial government of Arizona is quite important:

> "No salary shall be due or paid the officers created by this Act until they have entered upon the duties of their respective offices within the said territory."

There is, therefore, a clear legislative intent that the officers created by the Act of 1863 should not be construed to be acting as such until they actually entered upon the performance of their duties in Arizona.

4. We must also notice the provisions of the Act of March 3, 1853 (10 Stat. L., 247), now Section 2222 of the Revised Statutes, to the effect that a Surveyor General shall continue in the discharge of his duties after the date of the expiration of his commission and until the day when his successor enters upon the duties of his office. The commission of a public officer expires on his death, resignation or removal, or on the abolishment of his office; or *pro tanto* on the withdrawal from his jurisdiction of part of the territory committed to him. There is, therefore, independent of any other legislative sanction, a positive legislative sanction in the Act of 1853 for the Surveyor General of New Mexico continuing in the discharge of the duties of his office in the territory of Arizona until the Surveyor General of Arizona actually entered upon the discharge of his duties, and this did not take place until January 25, 1864 (Printed Record, pp. 48 and 156).

5. At any rate, independent of any legislation on the subject, the Surveyor General of New Mexico, was in June, 1863, the *de facto* Surveyor General of Arizona, and the Commissioner on April 9, 1864, so adjudged (Printed Record, pp. 299, 300).

6. With reference to the Baca Float in the Shaw case, the Act of February 28, 1861, entitled "an Act to provide a temporary government for the territory of Colorado" (12 Stat., 172), gave to the Surveyor General of Colorado *all* the "duties, powers, obligations and responsibilities" of the Surveyor General of New Mexico, thereby clearly giving the Surveyor General of Colorado the powers (if any) given to the Surveyor General of New Mexico by the Act of 1860; and the Commissioner directed adjudicative action by the Surveyor General of Colorado (Printed Shaw Record, p. 165). In 1861, when Colorado was

carved out of New Mexico, the Baca heirs had over two years more within which to make their selections under the Act of 1860.

7. The contemporaneous construction of the law and regulations as to the proper Surveyor General to take initial action, concurred in by Judge Watts, the Territorial Delegate to Congress (and a man of judicial experience) and by the Commissioner (Printed Record, p. 299), is of great weight.

8. Even if the Surveyor General had disapproved of the location, the Commissioner could have overruled him; consequently, so long as the highest authority has acted, any question as to whether or not the proper subordinate officer acted is immaterial. (See *Stalker v. Oregon Short Line*, 225 U. S., 142, 153.)

VIII.

Neither the actual completion of the survey nor the filing of its plat and field notes was a prerequisite to the passing of legal title in the case at bar.

Making of Survey, Plat and Field Notes Were Ministerial Acts.

The Commissioner on April 9, 1864, decisively exercised the only discretion under the statute; thereupon it became the "duty" of the proper Surveyor General to make the "survey and location." It is elementary that such a "duty" is necessarily ministerial, as the superior officer exhausted all discretion in ordering it to be performed. (See *Glasgow v. Hortiz*, 1 Black, 595, 601, 602.)

Furthermore:

> "the survey is one thing and the title another. * * * A survey does not create title; it only defines boundaries. Conceding the accuracy of the survey is not an admission of title."
>
> *Russell v. Maxwell Land Grant Co.*, 158 U. S., 253, 259.

In the Shaw case, the Commissioner on February 12, 1864, stated the plat of survey would be the "evidence of title"; and this Court was of the same opinion. (Opinion, pp. 342 and 343.) The field notes are in the nature of a diary.

In the case at bar, the plat was directed to constitute the "muniment of title" (Printed Record, pp. 299 and 300). A muniment of title is only a means of evidence of the title or its boundaries (*Wedge v. Spencer*, 7 N. Y. Supp., 172, 173). The complete right to a muniment of title is equivalent, *so far as the Government is concerned*, to a muniment already issued; and the execution and delivery of the muniment are merely ministerial acts of the officers charged with the duty.

> *Ballinger v. Frost*, 216 U. S., 240, 250.
> *Simmons v. Wagner*, 101 U. S., 260, 261.
> *U. S. v. Detroit Lumber Co.*, 200 U. S., 321, 335.
> *U. S. v. Stone*, 2 Wall., 525, 535.

Proper Time for Survey.

The Commissioner's general instructions of July 26, 1860 (Par. II of the Bill) contemplated the survey of a location on unsurveyed lands (such as in the case at bar), only when the "regular progress of the surveys" should reach the locality. Survey in the regular progress of the township and section system was not only more desirable, but obviated double work.

This is also clearly demonstrated by the Commissioner's letter of June 7, 1862, to the Surveyor General of Colorado (p. 318 of the opinion in the Shaw case), enclosing a copy of the instructions above referred to,

> "in which it was clearly indicated that, should selections be made outside of the public surveys, the survey thereof must be postponed until the vicinity is reached by the regular progress of the public surveys,"

and a contract with a private surveyor was sternly rejected, as the application for the location had not been approved (pp. 317 and 318 of opinion).

By an examination of the history of the other Floats (Printed Record, pp. 287 to 290), it will appear that an unconditional order for survey always *followed* an approval of the location and acceptance of adjudicatory certificates.

Such contemporaneous and practical construction by the Department of the proper time for survey constitutes a rule of property in the case at bar.

Segregation by Survey not Necessary to Pass Title.

In the case at bar there was a definite description of a specific tract, easily capable of identification, and, therefore, segregation by survey was not necessary to pass title.

Langdeau v. Hanes, 21 Wall., 521, 530, 531 (Approved in Shaw case, at p. 341; and in Joplin v. Chachere, 192 U. S., 94).
Snyder v. Sickels, 98 U. S., 203, 213, 214.
Morrow v. Whitney, 95 U. S., 551.
Whitney v. Morrow, 112 U. S., 693, 695.
Glasgow v. Hortis, 1 Black 595, 601, 602.
Act of June 2, 1862 (12 Stat., 410).

The surveyor in 1905 had no difficulty in finding and marking out the description used in the certificate of selection. The Commissioner on April 9, 1864, accepted the Surveyor General's approval as sufficient "to *perfect title,*" to make a complete divestiture. As the certificate of selection contained a description which would have been sufficient in a deed of conveyance, the survey was not required to make a description, but only to mark it; a survey was mutually advantageous just as if the grantor and grantee were both private parties, and it performed no greater function than it would in such a case. When A deeds part of his land to B, by definite boundaries, agreeing that a survey shall be made, title vests on the delivery of the deed, not on the completion of the subsequent survey.

The survey was not required to pass title; and the Act of 1862 provided that no such grants should be deemed incomplete for want of a survey or patent. The survey was only required to mark out on the ground the common boundary lines of both parties, or as Congress expressed it in the Act of 1862, to furnish *"prima facie evidence of the true location."* The survey would furnish the heirs with "a recognition of boundaries." (*Glasgow v. Hortiz, supra.*)

The Act of 1862 was enacted because of Civil War conditions, with the practical suspension of public surveys for financial and other reasons, and because of a desire to placate and hold the loyalty of persons in the West, who were clamoring for surveys which the Government was bound to furnish them. In 1871 the Act was repealed.

Function of the Survey.

The function of the survey was not to pass title, but to mark out the land so that its boundaries might

be *officially* monumented, and designated on a plat of survey according to the township and section system—the approved method of describing Western lands; and it would also inform the Government what land it had left. The Government fixes the boundaries between its remaining land and the land of its grantee.

Russell v. Maxwell Land Grant Co., 158 U. S., 253.
Langdeau v. Hanes, 21 Wall., 521, 530.
Joplin v. Chachere, 192 U. S., 94.
U. S. v. Montana Land Co., 196 U. S., 573, 578.

The orderly procedure in taking possession of public lands granted by the United States, where the grant is not in confirmance of a previous possession, is to wait until the Surveyor General marks out on the ground the lines of the grant, even though anyone could readily ascertain them without official aid.

In the case at bar the location was not of quantity nor did the certificate of selection state quantity, but the Surveyor General in his certificate mathematically figured out the quantity. The location was of a square tract of exact dimensions, beginning at a mathematical point from a permanent natural monument, in a direction on a line with the highest point of that monument. It was far beyond the public surveys; the description used was exact and unmistakable, and the surveyor in 1905 readily found it.

The grant in the *Stoncroad* case, 158 U. S., 240, was a Mexican grant with a very peculiar description, which not only under the Act of 1862, but also because of the confirmation on the Surveyor General's recommendation that it be surveyed, required "segregation and delimitation."

The Act of 1860 allowed the heirs to require a survey whenever they desired to have one. The Commis-

sioner on April 9, 1864, ordered one to be made. His construction of the Act of June 2, 1862, that it required the claimants to pay for the survey is concededly erroneous. The delay of the ministerial officers of the Government in performing the ministerial act of the survey can neither divest the title nor suspend its vesting.

Stalker v. Oregon Short Line, 225 U. S., 142, 153.
Glasgow v. Hortiz, 1 Black 595, 601, 602.
Lytle v. Arkansas, 9 How., 314, 333.

The survey has in fact been made and approved by the Surveyor General (pp. 36, 79 and 276a of Printed Record), *and is admittedly correct* (Printed Record, pp. 11 and 36). *If segregation by survey was necessary to pass title, such segregation has been made, and the references in the plat to mineral lands and so-called reserved claims are as irrelevant as the subject clauses in the Commissioner's letter and in the approval of the survey in the Shaw case. A survey cannot now have any greater legal effect than it would have had if it had been made in 1864.*

IX.

There was no valid reservation from selection by the Baca heirs of the land comprised within the three Mexican land claims.

Neither of the two treaties with Mexico of 1848 and 1853, respectively, operated in any way to protect or reserve lands within an invalid Mexican or Spanish grant. Whatever reservation there was must be found in the statutes of the United States (*Lockhart v. Johnson*, 181 U. S., 522, 523).

Congress had power to prescribe the mode of ascertaining the validity of titles under Spanish and Mexican claims or grants, and to provide for a forfeiture thereof unless the regulations for the ascertainment of the validity of the titles were complied with; or Congress could simply have directed the possession and appropriation of the land. Congress could act with process of law or without any process at all, especially as the Fourteenth Amendment had not then been passed.

Barker v. Harvey, 181 U. S., 481, 486, 487.
Ainsa v. U. S., 161 U. S., 208, 222.
Botiller v. Dominguez, 130 U. S., 238.
Tameling v. U. S. Freehold Co., 93 U. S., 644, 661, 662.
U. S. v. Repentigny, 72 U. S., 217, 268.

To Congress belonged the duty of providing for the mode of ascertaining the validity of Spanish and Mexican claims or grants; and Congress might perform that duty itself or delegate it (*Astiazaran v. Mining Company*, 148 U. S., 80).

Act of July 22, 1854.

The alleged statutory reservation relied upon by the appellants is found in Sections 8 and 9 of the Act of July 22, 1854, 10 Stat., 308, which read as follows:

> Section 8. "That it shall be the duty of the Surveyor General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory

> to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act."
>
> Section 9. "That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for fully carrying into effect the several provisions of this act."

Such regulations were in fact made by the Secretary and notice thereof published (Printed Record, pages 2 and 3). *All claimants were required to file a written notice* setting forth the nature, extent and history of their title, and also:

> "an authenticated plat of survey, if the survey has been executed, or other evidence, showing the precise locality and extent of the tract claimed. *This is indispensable in order to avoid any doubt hereafter in reserving from sale, as contemplated by law, the particular tract or parcel of land for which a claim may*

be duly filed, or in confirming the title to the same hereafter in the event of final confirmation."

Application of the Act.

The eighth section of the Act of July 22, 1854, applied only to the territory acquired in 1848, by the treaty of Guadalupe Hidalgo, and did not cover the land acquired in the Gadsden Purchase of 1853, of which the tract in the case at bar forms a part.

Nor did the Act of August 4, 1854 (10 Stat., 575), by which the land acquired in the Gadsden Purchase was "incorporated into the Territory of New Mexico, subject to all the laws of said last named Territory," render the land in the case at bar subject to the provisions of the eighth section of the Act of July 22, 1854, as none of the annexed land could be brought within the conditions of the section. Section eight referred twice to the Treaty of 1848, the provisions of which it sought to carry out. There was no obligation to ascertain titles in the Gadsden Purchase, *in order to give effect to the Treaty of 1848*, and a statute to ascertain titles which had been perfected *before the Treaty of 1848*, to lands acquired thereunder, cannot be extended, by simply changing the boundaries of New Mexico, to lands acquired by the Treaty of 1853, under which titles perfected as late as September 25, 1853, were protected *and different obligations assumed* (*see Ainsa v. U. S.*, 161 U. S., 208, 221, 222), especially as there is a distinct omission in the Act of July 22, 1854, of the land acquired under the Treaty of 1853, *and a consequent intention to exclude that land from the operation of the statute*. A revision of the section would be required to remove the restrictions which made it inapplicable to the Gadsden Purchase.

Nor was the eighth section of the Act of July 22, 1854, extended to the Gadsden Purchase by the Act of February 24, 1863 (12 Stat., 664), organizing the Territory of Arizona. The Act of 1854 was not the statute organizing the territorial government of New Mexico; that was done by the Act of September 9, 1850 (9 Stat., 446). The eighth section of the Act of 1854, was not, nor did it purport to be, in any way an amendment of the organic Act of 1850. We are giving the Act of 1863 the fullest possible meaning by including the evidently omitted words "and said Act," after the semicolon, and before the words "and amendatory thereof" in the second section.

The mere addition of other land to New Mexico or the extension of its laws thereover would not repeal the references to the provisions of a specific treaty and a specific body of land; but the general words of extension would be subject to the inherent limitations of the section, and would not be applicable unless the annexed land came within the conditions of the section. To make the extension operative, a repeal of the treaty references and of the time limit on the origin of titles would have been necessary.

The only statute which can by any possibility be construed to bring the lands in the Gadsden Purchase under Section 8 of the Act of July 22, 1854, is the Act of July 15, 1870. (16 Stat., 291, 304.) (See *Ainsa v. New Mexico R. R. Co.*, 175 U. S., 76, 77, 85; *Cameron v. U. S.*, 148 U. S., 301, 307, 311). Then the provisions of Section eight, by specific reiteration, *without the references to the Treaty of 1848, or its time limit on the origin of titles*, were extended for the first time to Arizona as a whole. This Court has intimated that the reservation provision was impliedly reenacted, although left out of the Act of 1870. That statute is spoken of in all the cases as a *supplement* to the Act of July 22, 1854.

It is clear, therefore, that the provisions of the eighth section of the Act of July 22, 1854, were never extended to the lands in the case at bar, until at least six years after legal title thereto had passed to the heirs of Baca.

Effect of Special Grant Following General Act.

Even if the eighth section of the Act of 1854 had been extended to the land in question before the Act of 1860, it would not in any event be read into the sixth section of the Act of June 21, 1860, as that was a subsequent *special act*, complete in itself, clearly specifying the kind of land available thereunder. (*Townsend v. Little*, 109 U. S., 504, 512; *Kepner v. U. S.*, 195 U. S., 100, 125; *Walla Walla v. Water Co.*, 172 U. S., 1, 22; *U. S. v. Nix*, 189 U. S., 199, 205.) An instance of a special grant not being subject to the reservations under a previous law is found in *Menotti v. Dillon*, 167 U. S., 703, 721 (approved in *U. S. v. Oregon R. R. Co.*, 176 U. S., 28, 46).

In all the railroad grants, there were provisions specifically excepting or referring to reserved lands; there was no such exception in the case at bar. In the Act of 1860, "vacant" means "unoccupied." (*Shaw* case, p. 332.) This Court has found that the Tumacacori and Calabasas claims had no occupancy subsequent to 1855 (*Faxon v. U. S.*, 171 U. S., 244, 246); and they have been specifically declared invalid, and the land included therein to have been in 1863 public land (*Faxon* case, *supra*).

Even if there were a reservation, the land remained public land to be disposed of by Congress as it saw fit (*Menotti v. Dillon*, 167 U. S., 703, 721); especially as there was no *appropriation* of the land for the actual use of any department of the Government (*Scott*

v. Carew, 196 U. S., 100, 109). The reservation was against *sale or any disposal in the nature of a sale, under any general law*, or against donation under the prior provisions of the same act; certainly there was not even an intention to bind a subsequent *Congress* from making a special grant, in a special law which particularly defined the conditions thereof.

If the provisions of the eighth section of the Act of July 22, 1854 are read into the sixth section of the Act of 1860, they must also be read into the other sections of the latter Act; and we should have the interesting situation of absolute confirmations by Congress, impliedly subject to reservations under a previous general Act, by which they would be absolutely nullified, if the appellants' contention be correct that an undisclosed mental claim is sufficient to reserve lands under the eighth section of the Act of 1854.

Construction of the Section.

Where a statute is ambiguous and susceptible of two constructions, the courts will adopt that construction which best comports to the principles of reason, justice and convenience (*Knowlton v. Moore*, 178 U. S., 41, 77; *U. S. v. Mrs. Gue Lim*, 176 U. S., 459, 467; *Standard Oil v. U. S.*, 221 U. S. 1); and the courts will lean to that construction of a statute which will uphold transactions consummated under it (*Provident Trust Co. v. Mercer*, 170 U. S., 593, 600; *Andes v. Ely*, 158 U. S., 312, 331). An exemption from future legislation must also be express or by clear implication. (*Penna. R. R. Co. v. Miller*, 132 U. S., 75, 84).

Every system of law for civilized communities requires that real estate titles, and all things connected therewith, be stated in public records. It would indeed be strange for Congress to intend a reservation,

ex proprio vigore, from the date of the Act, without any previous communication of the extent thereof to the Government which made the reservation or any notice to the public affected thereby.

The regulations made by the Secretary under the specific provisions of the eighth and ninth sections of the Act of July 22, 1854, are not only a part of the statute (*U. S. v. Grimaud,* 220 U. S., 506, 516, 517, 520; *Leonard v. Lennox,* 181 Fed., 760, 766; *Cosmos Co. v. Gray Eagle Co.,* 190 U. S., 301); but the Secretary's construction of the law, evidenced by such regulations, is controlling in the case of any ambiguity under the Act (*Jacobs v. Pritchard,* 223 U. S., 200, 213, 214).

A "claim" is necessarily a demand upon or assertion to another of some matter as of right (*Prigg v. Pennsylvania,* 16 Pet., 539, 615). The Surveyor General had other things to do except to roam around asking about titles, the records of which were in Mexico, where the owners also usually were. The regulation requiring the presentation of claims was an absolute necessity.

Not only did the Secretary require a presentation of claim, and a plat of survey or other evidence of boundaries, so that there might be no doubt thereafter in reserving the lands from sale (Printed Record, p. 3), but this Court also has understood that there was no reservation until the presentation or assertion of a claim. (*Lockhart v. Johnson,* 181 U. S., 516, 521; *Ainsa v. N. M. & Ariz. R. R.,* 175 U. S., 76, 89). Such was the understanding of the Department until the year 1900:

1 L. D. 167, 168, Comm. McFarland, 1883.
3 L. D. 438, 439, Sec'y Teller, 1885.
4 L. D. 430, 431, Sec'y Lamar, 1886.
16 L. D. 408, 420 to 422, Sec'y Smith, 1893.
27 L. D. 604, 608, Act'g Sec'y Ryan, 1898.

Then it overrruled, in 30 L. D. 97, on a misconstruction of the Lockhart case, all its previous adjudications.

In the Lockhart case, the Court below treated the reservation as attaching on the Surveyor General's report (*Lockhart v. Wills,* 54 Pac., 336, 338). The Bar Association of New Mexico, in a Memorial to Congress with reference to the Court of Private Land Claims Act, treated the reservation in the Act of 1854 as applying only to "claims presented to the Surveyor General of New Mexico." (Brief for Defendant in Error, p. 25, in *Lockhart v. Johnson, supra.*) In that case even the counsel for the plaintiff-in-error contended that such reservation attached when the claim "was surveyed and reported to Congress" (see his Brief, p. 19); and counsel for the defendant-in-error quoted from the Memorial of the New Mexico Bar Association as above stated.

The appellants herein base their contention that there was a reservation from the date of the Act of 1854, on the expression of this Court on page 526 of the opinion in the Lockhart case:

> "During the period between the passage of the Act of 1854 and that of 1891 they were not open for sale or other disposition *while the claims to such lands were undetermined.*"

A claim commenced to be "undetermined" when the petition for confirmation was filed with the Surveyor General. This is clearly shown by the statement on page 521 of the opinion:

> *"The Cochiti grant came before the Surveyor General pursuant to the provisions of the Act of 1854, and therefore by the terms of that portion of section eight, just quoted, the lands were reserved from sale or other disposal by the Government until final action by Congress thereon."*

Furthermore the burden of proof, with its consequent duty to assert the claim, was on the claimant. (*U. S. v. Ortiz,* 176 U. S., 422, 426 and cases cited.) Such claims have never been treated as *sub judice* until a claim therefor had been duly made to the Surveyor General under the regulations. (*Astiazaran v. Santa Rita Co.,* 148 U. S., 80, 83, 84; *Cameron v. U. S.,* 148 U. S., 301, 310; *Ainsa v. New Mexico R. R.,* 175 U. S., 76, 86.) A withdrawal from disposal under general law is absolutely analogous to a withdrawal of the claim from the jurisdiction of the courts, and must of necessity be exactly contemporaneous therewith.

Compliance with the regulations was necessary, not only to give certainty to the reservation, and notice to the Land Department, but also to protect innocent purchasers. (*Menard's Heirs v. Massey,* 8 How., 293, 309.)

The reservation was "until final action by Congress." Congress could not act until the claim was submitted to it by the Surveyor General; that official could not submit the claim until it was brought to his notice under the regulations. A claim not brought to his notice could, therefore, never obtain any action thereon by Congress; and it follows that a claim on which Congress could not take action is not within the scope of the reservation. The reservation was "until final action by Congress on such claims" as should be "ascertained" by the Surveyor General and reported to Congress. By all grammatical rules, "such" refers to the claims on which the outlined procedure has been followed. It is a word of limitation; if claims not "ascertained" had been meant, either the words "a" or "any" would have been used instead of "such."

The Act extended on easy terms a most comprehensive mantle of protection over the lands covered by

any Mexican or Spanish claim. Any claimant who ignored or defied the regulations, which were expressly made a part of the statute, would not be entitled to the protection of the reservation. He could not defy the law and have all the benefits of a diligent obedience thereto, and still incur no risk of having his claim rejected.

The Non-Existence of Claims up to April 9, 1864, is Res Adjudicata.

In the certificate of selection (Printed Record, p. 7), is the allegation that the land is entirely vacant and not claimed by any one. The truth thereof was sanctioned by the Surveyor General of New Mexico when he approved the location; his language was in the nature of a general verdict. On April 9, 1864, the Commissioner accepted and adopted that approval as all that was necessary "to perfect title" to *all* the land selected. There was, therefore, an adjudication that the land was not claimed by any one when selected. (*U. S. v. C. M. & St. P. Ry. Co.*, 218 U. S., 233.)

The record herein bears out that adjudication. A later assertion of claims is no evidence of any belief in 1863 of their validity; the longer the delay in presentation, the less the likelihood that the claimants had any faith therein in 1863. Claims to Tumacacori and Calabasas (admittedly invalid Mexican grants) were not filed until June 9, 1864 (Printed Record, p. 73), and refiled in 1879 (*Astiazaran v. Santa Rita Mining Co.*, 148 U. S., 80, 81). The de Senoita grant was not claimed until 1879 (Printed Record, p. 73), and then for three times its valid limits (*Ely's Administrator v. U. S.*, 171 U. S., 220, 234); and it required segregation and delimitation, under the decision of this Court.

The priority of right to the confirmed part of the de Senoita claim is not for adjudication in this case,

nor have the appellants any interest therein. The plat of survey in the case at bar will be a muniment of whatever title passed to the heirs of Baca on April 9, 1864. The holders of the de Senoita grant have lost their rights to their land within the tract at bar, and are remitted to a suit against the United States (*Court of Private Land Claims Act*, Section 14, 26 Stat., 854); if that be so as to a confirmed Mexican grant, where the American grant was expressly protected the same confirmance was impliedly extended to American grants within rejected Mexican claims, and the express repeal of the reservation clause of the Act of 1854 must be held to be retroactive. Congress never intended that its grantees within the limits of a rejected Mexican claim should be in a worse position than those within a confirmed Mexican grant. An Act of Congress can repeal a treaty provision. (*Ex parte* Webb, 225 U. S., 663, 683).

Tumacacori and Calabasas were concededly public land until selected by the Baca heirs, and no occupancy thereof subsequent to 1855 could be proved (*Faxon v. U. S.*, 171 U. S., 244, 246).

Mischievous Consequences of Appellants' Contentions.

The eighth section of the Act of 1854, operated over most of Arizona and New Mexico and parts of Colorado and Nevada.

If the appellants' contentions are correct, every title of any kind granted by the Government in that vast expanse of territory, between 1854 and the repeal of the statute in 1891, may be rendered null and void by the mere proof that the land covered thereby was included within the claimed limits of some invalid Mexican or Spanish grant or claim, even if there never

was any presentation thereof for confirmation or any notice of any kind given.

The mere consequences of such a contention are sufficient to defeat it in any court of justice.

Our construction of the reservation clause (if it apply in the case at bar) will harm no one, not even the United States, as it received consideration, acre for acre, for what it granted in the case at bar. Our construction certainly comports with all notions of fair play and of that honorable dealing which the United States itself requires from its humblest citizen, and to which it binds itself when it asks a citizen to exchange lands with it.

X.

Subsequent history of the grant.

On April 30, 1866, John S. Watts applied to the Commissioner for leave to change the location of Baca Float No. 3 (Printed Record, pp. 50-52). The Commissioner asserted his willingness to make the change "provided by so doing the outboundaries of the grant thus (to be) surveyed will embrace vacant lands not mineral" (Printed Record, pp. 52 and 53).

This attempt to change the location met with only a conditional approval and, of course, there would be no divestiture of the title which passed on April 9, 1864, until there was an investiture of title for the land sought to be taken therefor. On July 25, 1899, the Secretary decided that the attempted amended location of 1866, was void *ab initio* (Printed Record, pp. 209 to 219).

It is conceded herein by all parties that the Commissioner, on June 21, 1866, had no authority whatsoever to allow the attempted change in the location.

In 1870, John S. Watts, quitclaimed to Christopher

E. Hawley his rights to the attempted amended location (Printed Record, p. 322). Under this deed the appellees Davis and C. C. Watts claim.

Between 1866 and 1899, various proceedings were had in the Land Department by persons claiming under Hawley with reference to the attempted amended location of 1866. It needs no argument to demonstate that the acts of these persons cannot be imputed to those holding the legal title to the valid, original location of 1863.

No Submission to Jurisdiction of Department.

Neither the appellees Vroom and John Watts, nor their predecessors in title, have ever submitted themselves in any way to the jurisdiction of the Land Department. As will appear by the Printed Record (pp. 228, 230, 231 and 249), all that the appellees Vroom and John Watts have ever asked is the execution of the survey ordered on April 9, 1864, and they have expressly denied at all times the jurisdiction of the appellants to make any adjudication whatsoever.

Location of 1863 Always Before Department.

From an inspection of decisions and letters of various officials of the Land Department (Printed Record, pp. 56 to 59, 177, 178, 178a, 183 to 186, 197 to 201), as well as of all the Department proceedings after July 25, 1899, it will appear that the Department constantly had in mind that the location of June 17, 1863, was outstanding, subject to the validity of the attempted amendment thereof in 1866. On May 16, 1884, (Printed Record, pp. 177 to 179), the Commissioner sent to Senator Bayard, Chairman of the Committee

on Private Land Claims, all the papers in the matter with a map (Printed Record, p. 178a) showing the locations of 1863 and 1866, and a statement (Printed Record, p. 179): "It does not appear from the record that any land has been patented within the limits of the location of June 17, 1863."

Government Responsible For Errors.

If the Department made any mistake as to the legal effect of the Commissioner's order of May 21, 1866, it cannot be charged or imputed to the appellees Vroom and John Watts. Had the Department executed the order of survey of April 9, 1864, in accordance with the law, it would not be in any difficulties now with persons claiming under homestead or mineral entries, most of whom filed their entries since 1899.

It is well settled law that the Government must bear the consequences of its own mistakes and blunders and that no default or neglect of any officer of the Land Department can affect the title.

Lytle v. Arkansas, 9 How., 314, 333.
Stalker v. Oregon Short Line, 225 U. S., 142, 153.
U. S. v. Arredondo, 6 Pet., 691, 730.
Glasgow v. Hortiz, 1 Black, 595, 601, 602.

In the letter of the Assistant Commissioner of the Land Office, dated May 13, 1907, introduced by the appellants as their Exhibit No. 51 (Printed Record, 277 to 280), it appears that *"the survey of the said location (of 1863) has been repeatedly refused until the claimants should deposit sufficient money to cover the expense thereof."* The construction by the department of the Act of June 2, 1862 (12 Stat., 410), that payment for the survey was required from the grantees in the case at bar, is concededly erroneous. Had the Land Department performed its duty as re-

quired by law the appellees would now have no need of equitable relief.

From an examination of various proceedings by the Land Department, it will appear that until the decision of this court in the Shaw case in 1898, there was considerable doubt whether the words "vacant land not mineral" were words of description or of reservation and exception, and whether or not the subsequent discovery of mineral or of evidence thereof affected the grant. Since the decision of this court in the Shaw case, the Department has become perplexed as to when title actually passed. After the Secretary's decision of June 30, 1900 (Printed Record, 220 to 227), the Department sought to hold that lands within the Mexican claims heretofore discussed, were reserved and did not pass to the appellees, contending then for the first time that the Act of 1854, not only applied to the lands in the case at bar, but also reserved lands covered by all Spanish or Mexican claims, irrespective of their validity and without any presentation thereof to the Surveyor General for confirmation; thereby directly overruling many previous decisions.

XI.

The validity of the grant and the passing of legal title thereto have been recognized by the Land Department since April 9, 1864, in various ways.

First: By the order (Printed Record, p. 52) attempting to allow an amendment of the location. If there were no valid location there certainly would be nothing to amend.

Second: By the Commissioner's letter of September 20, 1877, constituting Appellants' Exhibit No. 19 (set out in Answer, pp. 57 and 58 of Printed Record). In this the Commissioner called attention to the fact that the only reason why the survey of the location had not been executed was that no deposit had been made to defray its cost, but that there was no obstacle to its being executed at that time, because the Act of June 2, 1862, had been repealed; and the Commissioner further said he did not find that the location had been disapproved by his office.

Third: By Secretary Lamar. In denying an application to relocate the grant, Secretary Lamar (afterwards a Justice of this Court) held on June 15, 1887 (Printed Record, pp. 183, 185) that

> "it is conceded that a selection was made, the location designated and approved by the Surveyor General June 17, 1863, agreeable to the provisions of the Act";

that the Government did not contend that the selection was improper, and that the ruling of Commissioner Williamson with reference to Baca Plat No. 4 to the effect that:

> "The question as to the mineral or non-mineral character of this land has been passed upon by competent authority, the title has passed from the Government and vested in private individuals, this office has no authority to reopen the question, the land can no longer be regarded as part of the public domain—"

was "applicable to this case and should have controlled" the Commissioner when he allowed the application to relocate. The ambiguity as to whether the location of 1863 or of 1866 was referred to by Secretary Lamar is more apparent than real; no certificate was ever made by any public officer as to the at-

tempted amended location of 1866, and survey thereof on May 21, 1866 was ordered,

> "provided by so doing the outboundaries of the grant thus surveyed will embrace vacant lands not mineral" (Printed Record, pp. 52, 53).

Fourth: By Secretary Hitchcock. On July 25, 1899 (Printed Record, pp. 209 to 219), in deciding an application for the execution of the order of survey, Secretary Hitchcock, in an opinion initialed by Assistant Attorney General Van Devanter, now a Justice of this Court, held that Commissioner Edmunds had no authority to allow the attempted amended location of 1866, and that the Commissioner on April 9, 1864 (Printed Record, p. 211) had accepted the approval of the Surveyor General of Mexico,

> "*as sufficient* and a survey of the grant under the selection thus approved was directed to be made. Instructions for the survey were given in minute detail."

The Secretary continued (Printed Record, p. 215):

> "*The selection of June 17, 1863 was within time and appears to have been in all respects regular. It was approved by the Surveyor General, whose approval, subsequently supported by the certificates of the Register and Receiver as shown, was accepted by your office and the survey of the claim ordered.*"

The Secretary held (erroneously as we claim) that the Surveyor General of Arizona and not of New Mexico, was the officer to pass first upon the selection, and referred the matter to the Surveyor General of Arizona for that purpose. *That was the sole ground on which further adjudicative action was deemed necessary.* Appellants herein do not now seriously contend that the Surveyor General of *Arizona* was the proper officer; we have discussed the matter of the proper surveyor general in a separate Point.

This erroneous construction of the law is not binding on the Courts, which have the jurisdiction to correct or ignore it.

Wisconsin R. R. Co. v. Forsythe, 159 U. S., 46, 61.
Sanford v. Sanford, 139 U. S., 642, 647.
Hawley v. Diller, 178 U. S., 476, 489.

Fifth: By "the statement of *confirmed* private land grants in New Mexico" on page 398 of the report of the Commissioner of the General Land Office for the year 1869, in which it is stated in a footnote that "the heirs of Baca have located said grant in five square bodies, namely: Nos. 1 and 2 in New Mexico, Nos. 3 and 5 in Arizona and No. 4 in Colorado." This statement is printed on pages 92 and 93 of the printed Record on Appeal in the Shaw case, and is undoubtedly one of the recognitions referred to in the opinion of the Court in that case.

Sixth: By the map of "Territory of Arizona, compiled from the official records of the General Land Office and other sources" and issued in 1903 by the "Department of the Interior, General Land Office, William A. Richards, Commissioner," in which the 1863 location was colored and set out as a *"private land grant"* in the same manner as the No. 5 location in Yavapai County, which latter location was patented in 1898, the Land Office receding from its position that no patent could be issued, as will appear by 36 L. D., 455, at pages 462 and 463 (see also Sec. 24 of Bill on p. 13 of Printed Record and admission in Answer on p. 38 of Printed Record). The Court will take judicial notice of this map as it is a public document.

XII.

Discussion of Appellant's' Brief.

We received the very interesting brief of the appellants too late to make any extended comment thereon, and, therefore, discuss only a few of its statements, believing that the rest are fully covered by our brief:

Page 11: Counsel for the appellants are in error in giving the impression that the appellees Vroom and John Watts, or their predecessors in title have ever claimed anything except the 1863 location. We also refer the Court to page 71, *supra*.

Page 28: The quotation from the letter of June 17, 1863 does not warrant the statement made by counsel for the appellants, and the inferences which they draw from the letter of April 30, 1866 are also clearly unwarranted.

Page 31: On pages 41 to 43, *supra*, we state what the Commissioner had before him on April 9, 1864.

Page 38: We answer counsel for the appellants as to the proper Surveyor General on pages 50 to 53, *supra*.

Page 39: No one contends that the letter of April 30, 1866 reinvested title in the United States to the 1863 location. That letter was simply a request of the grantor to give other land in lieu of what had been granted, and the answer thereto was a conditional assent which should not become absolute unless it affirmatively appeared that the land asked for was of the same character as the land granted. A man does not lose his land by asking his grantor to give him other land in lieu of it.

Page 41: Neither the appellees Vroom nor John Watts nor their predecessors in the title, had anything to do with the various proceedings in the Land Office until after 1899, and all that they have ever asked is the execution of the order of survey. This we set out on page 71, *supra*.

Page 45: The Surveyor General of Colorado acted in the Shaw case for the reasons stated on pages 52 and 53, *supra*. (See also pages 50 and 51, *supra*.)

Page 50: The grant was of the right to select in square form other land in lieu of the acreage of Las Vegas. It was not a grant of alternate sections, where a survey is necessary to create any sections at all. The right to select necessarily contemplates the picking out of a specific tract. The certificate of selection in the case at bar was not the selection of acreage but of a specific tract by a description which would have been sufficient in a deed of conveyance; this specific selection was in accordance with the Commissioner's instructions set out on pages 5 and 6 of the Printed Record.

Page 51: Counsel for the appellants build up Salero Mountain in a form which suits the convenience of their argument. Southern Arizona is not a mountainous region and mountains in the deserts of the Southwest rise abruptly from the surrounding plain, because of the peculiar geological conditions which brought them into existence.

Page 52: We have discussed herein quite fully the function and effect of the survey. We also refer the Court to what we have said in answer to page 50 of the appellants' brief. A deed for a fifty foot frontage on Pennsylvania Avenue, beginning a certain number of feet from a well known street corner, certainly would not require any survey to pass title to it, al-

though the monumenting of the corners of the plot would be greatly desirable. If, however, the deed were for a fifty foot frontage on Pennsylvania Avenue, to be located between two points, no title would pass to any particular land until there was a segregation or partition to fix the land taken by the grantee. A survey is not necessary to pass title when it simply marks out the description. A survey is required to pass title only when it changes the ownership of the grantee to a tenancy in severalty in a specific plot from a tenancy in common in the entire body of land.

Page 67: The reservation clause in the Act of 1854 is chiefly asserted in the case at bar to withhold from the appellees land within invalid Mexican claims, which have in fact been rejected by this Court; and the Court of Private Land Claims Act of 1891 shows a clear intention to quiet title to all American grants, notwithstanding the fact that they may have been within the limits of a Mexican claim. This we discuss fully elsewhere.

Page 72: Counsel for the appellants admit that the conveyance recites the grantors to be "the heirs, or owners of the interests of heirs, of Baca." We have discussed on page 11, *supra*, the effect to be given to such recitals in ancient deeds, when there has been no inconsistent possession on the part of the grantor.

Page 74: No inconsistent possession on the part of any grantor in the Baca deeds has been proved—in fact there is no evidence in the record as to who has had possession of the tract. Neither the appellees, Vroom and John Watts, nor their predecessors in title, have ever taken any part in the efforts of the claimants of the 1866 location. The provision in the decree as to the passing of legal title out of the United States was inserted by counsel for the appellees as

a recitative provision on which the injunction order was based. Under the recent amendment to the Equity Rules, it is no longer proper to use the old form of equity decree, and counsel for the appellees, in good faith, drew the decree to comply with the new rules, and also so that the decree would show on its face some basis for the Court's action. There was no intention to have the decree go any further.

Page 76: The United States is not bound by any decree in this case. The plaintiff in an ejectment action is obliged to prove title in himself from a long chain of grantors and it is not necessary for him to make such grantors parties to the action, nor may the defendant aver that the grantors might set up certain defences of fact. The admitted facts in this action fail to sustain any claim of title in the United States, and the assertion that the United States makes such claim is at most an erroneous conclusion of law. No question of fact as to the propriety of the selection is admissible in the case at bar.

Page 91: There is no proof in the record as to possession of the tract at bar. If the United States has anything which it wishes to litigate, it is not barred by the decree.

Page 106: Counsel for the appellants in a rather general and hurried statement in the fifth sub-division draws an unwarranted conclusion from the letter of April 30, 1866, and overlooks the fact that neither the appellees Vroom nor John Watts, nor their predecessors in title, have ever admitted that the land is not such as the heirs of Baca were entitled to take under the Act. The charge of fraud in the Surveyor General's report in 1905 was not repeated in the appellants' answer, nor was any allegation of fraud made in the answer nor any proof thereof offered on the trial. The appellees, therefore, were not

called upon to controvert something which was neither alleged nor proved by the appellants.

XIII.

Conclusion.

Legal title has passed from the United States; and the Court below rightfully exercised its jurisdiction in restraining the appellants from interfering with that title, and enjoining them to file the plat of survey as a muniment of title. None of the land within the three Mexican grants was reserved against selection by the Baca heirs, and the Department's recent decision to the contrary is clearly erroneous.

The Baca heirs gave full value in acreage for what they received in the case at bar, and they should be protected therein.

The decree should be affirmed.

New York City, March 27, 1914.

Respectfully submitted,

G. H. BREVILLIER,
Attorney and counsel for Appellees,
James W. Vroom and John Watts.

JAMES W. VROOM,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

FRANKLIN K. LANE, SECRETARY OF THE Interior, and Clay Tallman, Commissioner of the General Land Office, appellants,

v.

CORNELIUS C. WATTS, DABNEY C. T. Davis, jr., John Watts, and James W. Vroom.

No. 889.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FOR REHEARING.

Come now the appellants and petition the court to grant a rehearing in the above-entitled case, and for cause show:

1. The decision leaves open the question of the status of the conflicting Mexican grants—San Jose, Tumacacori, and Calabazas—and yet affirms a decree which enjoins the appellants from further action in respect to the Ohm homestead entry and other entries which are within the boundaries of these Mexican grants. The point made by the appellants

was that in no event could the appellees take the lands embraced by these grants because the same were reserved and not subject to appropriation at the time of selection of Baca Float No. 3. If this be so, the appellants ought not to be enjoined as to entries within said grants.

The court leaves the point undetermined and says that it is not now concerned with such question; that if a controversy should arise it will properly be adjudicated in the courts where the lands are located.

Suppose such a question should arise locally and suppose the courts should decide that these grants were in a state of reservation in 1863 and 1864: Yet the injunction against the appellants would remain in force and prevent any proper and necessary administration of the lands—a singular anomaly.

Following the departmental decision remitting the claimants to the selection of 1863, the question immediately arose in the department as to the status of these conflicting Mexican grants. It was held June 30, 1900 (Record, p. 220), that the Tumacacori, Calabazas, and Sonoita claims were in a state of reservation from sale or other disposal by the Government under the eighth section of the act of June 22, 1854, and for that reason could not be taken by the claimants under the Baca grant.

Immediately thereafter appellees, James W. Vroom and John Watts, filed a petition for hearing on this and other questions. (Record, p. 230.) Again, the Secretary, March 5, 1901 (Record, p. 230), held emphatically that these grants, valid or invalid, were

reserved lands and could not be taken by the Baca claimants nor in any way disposed of by the Government itself until the validity of these Mexican grants had been settled.

Now if these lands were reserved under section 8 of the act of June 22, 1854 (10 Stat., 308), and if the Land Department, notwithstanding that fact, did acts that culminated in an attempted transfer of the legal title to the heirs of Baca on April 9, 1864—a transfer of title to lands that embraced over 30,000 acres of land reserved by Congress from any form of disposition at that time—then the conveyance, at least so far as these conflicting Mexican claims are involved, was absolutely void.

In *Burfeaning* vs. *Railroad*, 163 U. S., 321, this court said:

> But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title and may be challenged in an action at law. In other words, the action of the land department can not override the expressed will of Congress, or convey away public lands in disregard or defiance thereof.

In *Noble* vs. *Union River Logging Co.*, 117 U. S., 165, 173, this court said:

> In the one class of cases it is held that if the land attempted to be patented *has been reserved* or was at the time no part of the public

> domain, the Land Department has no jurisdiction over it and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant or in issuing a patent is not merely irregular but *absolutely void*, and may be shown to be so in any collateral proceeding.

Several cases are cited in support of the proposition.

The conveyance is absolutely void. Yet if void, under the decision of this court and by operation of the decree which it affirms, the appellants are perpetually enjoined from any action in respect to lands within these conflicting grants on the theory that title passed to the appellants in 1864—i. e., that the commissioner passed a title that he had no power to pass.

The court holds that "the action of the commissioner in approving the location of the grant can not be revoked by his successor in office, and an attempt to do so can be enjoined." This is so, provided the commissioner in the first instance had authority to act, had power to dispose, and did act and dispose of public land. But suppose the land was not public land of a class subject to his disposition, but was land reserved by Congress from any kind of appropriation until after the happening of certain events? In such event the commissioner would have had no jurisdiction to pass title to the reserved land, his act in so doing would have been absolutely void—no act at all—and there could not be a revocation thereof by a subsequent officer, for the simple reason that there was in law no act to revoke.

If, therefore, Commissioner Edmunds in 1864 had no authority to dispose of these reserved lands, and if during the three years from June 21, 1860, within which the heirs were privileged to select nonmineral and unoccupied land the 30,000 acres in the conflicting Mexican grants (Sonoita, Calabazas, and Tumacacori) were withdrawn by Congress from any form of appropriation until the validity of the claims was settled, and thereafter in 1898 by decision of this court it was found that the Tumacacori and Calabazas claims were invalid—the point we urge is that the Tumacacori and Calabazas lands then became part of the unappropriated public domain subject to the operation of the public land laws; and this not because any commissioner has since undertaken to revoke what Edmunds did in 1864, but because Edmunds' act, so far as the lands are concerned, was absolutely void *per se*.

Now, if the proposition be sound, the appellants ought not to be enjoined from any action within the lines of Tumacacori and Calabazas—the boundaries of which form a part of the Contzen plat of survey.

Nor can we understand how the court may enjoin us perpetually without first, at least, deciding that these Mexican claims were not reserved lands in 1863.

Yet, if we understand the court's decision, it says this court is not concerned with the conflict of the Baca grant with these other grants—that being a question to be adjudicated in the courts where the lands are located if a controversy should arise.

At the risk of repetition, we again call attention to the fact that the claims as claims *in toto* can not become the subject of controversy, because this court has already decided that the Tumacacori and Calabazas grants were invalid (*Faxon* v. *U. S.*, 171 U. S., 204); but a controversy might arise between the appellees and the homestead settlers, the latter attacking collaterally the act of Commissioner Edmunds in 1864 in unlawfully attempting to dispose of these grants while yet by act of Congress reserved from any form of disposal except by Congress itself. If, then, it should develop that the local courts were of the opinion that Edmunds's act was void as to these lands and that the homesteaders were entitled to perfect their entries under the provisions of the public land laws because the areas embraced by the outboundaries of these Mexican claims were a part of the public domain at the time of their entries, then we are confronted with the anomalous situation that the Land Department may do nothing because the officers are perpetually enjoined.

In brief, we urge that there should be no permanent injunction unless and until the court has settled the legal status of these claims in 1863; and for that we respectfully request that a rehearing be granted on that point.

2. As we understand the opinion of the court, the action of the commissioner taken on April 9, 1864, when he ordered a survey, operated to pass the title. It is also held that a survey was necessary to segregate the lands from the public domain. And in the case

of *Edmund Burke* v. *Southern Pacific Railroad Company et al.*, decided on the same day, the court held that under the Baca grant, the approved survey took the place of a patent under the statute. There was no survey in this case until 1905.

In this case, there was no definite location until a survey had been made. The selection tendered by the heirs of Baca June 17, 1863, was vague: "commencing at a point one and one-half miles from the *base* of Solero Mountain in a direction north 45 degrees east of the highest point of said mountain."

It was asserted in oral argument by counsel for appellees that the initial point was by this description established with mathematical accuracy. Lack of time prevented reply at the oral argument to this assertion. There is no allegation of fact in the bill upon this point and no evidence in the record as to the topography of the country northeast of the mountain. No presumption upon a question of fact of this kind is permissible, and the burden was upon the appellees to prove that this description was of sufficient certainty legally to establish the initial point. It is a matter of common knowledge that in this western country mountains or prominent hills merge into foothills or rolling country. It is a matter purely of individual opinion as to where the "base" of a mountain may be said to be. A hundred different surveyors might have a hundred different ideas as to the location of the "base" as intended in the selection. So this grant to which it is held that title passed in 1864, before

survey, might have been located by the surveyor so as to have covered land a mile farther to the northeast than Contzen made it, thus leaving out much of the land now included within the outboundaries of what Contzen took to be the land described in the certificate of selection.

If title can pass on the mere order of a survey, and yet if upon survey it was impossible to locate the land according to the description, the effect of the court's decision would be the same.

We respectfully urge that the survey was an essential element in the passing of title, because without it not only would the real lines and the definite location never be known, but because survey was required to segregate the float from the public domain, as the court holds.

We respectfully ask the court to reconsider the point.

3. The appellants raised the point that at the time of the selection of 1863, Bashford, surveyor general of Arizona, and not Clark, surveyor general of New Mexico, had jurisdiction over the selection and the right and duty to pass upon its validity. This is disposed of by this court on the ground "that the act of 1860 devolved the duty on the surveyor general of New Mexico, and the Land Office, upon whom devolved the ultimate responsibility, approved the location." Elsewhere in the opinion reference is made to *Shaw* v. *Kellogg*, 170 U. S., 312, stating that in that case the surveyor general of New Mexico was the officer selected; he, who was most competent to

examine and pass upon the question of the character of the lands, and to pass upon them at the time of location.

Now the facts are that the surveyor general of New Mexico performed no function at all in Baca float No. 4, the float involved in *Shaw* v. *Kellogg*, other than to forward a copy of the certificate of selection to Washington and another copy to the surveyor general of Colorado, then set off from New Mexico. He recognized that the surveyor general of Colorado, not he, had jurisdiction. Everything that was done in respect to No. 4—all that the court speaks of as incident to the passing of title—was done by the *surveyor general of Colorado* and not by Clark, surveyor general of New Mexico. It was the surveyor general of Colorado who passed upon the character of the land and who executed the functions attending the survey and the passing of title.

So in this case, we maintained that the surveyor general of Arizona, not the surveyor general of New Mexico, was the officer with jurisdiction; that Clark had no jurisdiction and that his so-called approval of the selection was without force and effect; and that no surveyor general of Arizona had acted in respect to this selection until 1905.

Now if the surveyor general of Colorado had jurisdiction in respect to float No. 4, even if the surveyor general of New Mexico was the officer named in the act of 1860, why, with equal force, should it not be concluded that Bashford, surveyor general of Arizona, and not Clark, the surveyor general of New Mexico,

had sole jurisdiction in respect to No. 3—the land float involved in this suit?

We respectfully urge that the court give reconsideration to this point.

Wherefore, appellants respectfully petition the court to set aside its decree herein rendered on June 22, 1914, and order a rehearing of the cause.

PRESTON C. WEST,
Assistant Attorney General.
C. EDWARD WRIGHT,
Assistant Attorney.

JULY, 1914.

I hereby certify that in my opinion the foregoing petition for rehearing is well founded in law, and that the same is filed in good faith and not for the purpose of delay.

PRESTON C. WEST,
Assistant Attorney General.

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